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TABLE OF CASES REPORTED.

PRIVY COUNCIL.

	PAGE.
Desai v Desai	598
Jamnabai v Fazalbhoy Heptoola	160
Judawan Prasad v Shatruhan Prasad	625
Kaju Mal v Salig Ram	536
K V Kore v Municipal Corporation of Bombay	169
Macmillan & Co v K and J Cooper	637
Mahomed Rahimtulla Haji Joosab v Esmail Allarakhia	567
Mallireddi Ayyareddi v Adusumilli Gopala Krishnayya	164
Marwadi Ramjivan Nevatia v H Bhikaji & Co.	655
Ma Than Than v Ma Pwa Thit	334
Ma Thaung v Ma Than	618
Mussammat Durga Devi v Shambhu Nath	661
Nagendra Bala Dasi v Dinanath Mahish	532
Nainapillai Marakayar v Ramanathan Chettiar	546
Ohala Kondama Naicker v Kandaswamy Gounder	172
Raghnath Prasad v Sarji Prasad	610
Raja Brij Narain Rai v Mangla Prasad Rai	23
Ram Lal Hargopal v Kishanchand	628
Ram Singh v Ram Chand	158

FULL BENCH.

Abdul Sattar Sahib v Special Deputy Collector: Vizagapatam Harbour Acquisition	209
Baluswami Iyer *In the matter of*	86
Best & Co. v Corporation of Madras	217
Frear v Johnson ...	282
Kadirvelusami Nayakar v The Eastern Development Corporation, Ltd ...	261
Meyyappa Chettiar v Chidambaram Chettiar	415
Parthasarathi Naidu v Khoteswara Rao	201
Rajagopala Aiyar v Ramanujachariar	104

HIGH COURT CASES.

Abdul Jaffar Sahib v Venugopal Chettiar	503
Adimoola Mudaliar v Manicka Mudaliar	329
Aiyisa Bivi Ammal v Kalandarsa Rowther	501
Anantalal Damani v Surajimull Murlidhar Chandick	239
Appasami Mudali, *In re*	447
Arumaga Goundan v Periavanjiappa Goundan	348
Arunachala Goundan v Swaminatha Iyer	240
Assistant Commissioner, *In re* ...	150
Ayyadevara Mohanleswara Rao v Ayyadevara Durgamba ...	189
Balaguru Naidu v Muthuratnam Aiyar	254
Baluswamt Iyer v Krishnaswami Iyer	497
Best & Co., Ltd., v The Corporation of Madras	505
Bharata Iyer *In re*	324
Brito v Brito	857
Chinnah *In re*	809

	PAGE.
The Commissioner of Income-Tax, Madras v Arunachalam Chettiar	68
Doraivelu Mudaliar v Audikesavelu Naidu	343
Gangi Ammal v Govinda Padayachi	464
Gothipati Suryanarayana v Sree Raja Ankineed Prasad Bahadur	565
Gourikantam v Ramamurthy	482
Immudipattam Bommaya Naicken Ayyan v Subramania Iyer	374
Jeladi Burayya v Ponduri Ramayya	49
Kandaswami Goundan, *In re*	45
Kandaswami Goundan v Subbai Goundan	345
Kandaswami Naidu v Kanniah Naidu	366
Kannan Kutty v Velu	122
Kanna Panikkar v Nanchan	340
Kanniappa Chettiar v Ramachandra Iyer	407
Kanthamma v Manchiraju Reddi Pantulu	134
Kavali Sankara Rao v Ramakrishnayya	184
Kaveribai Ammal v. Mehta & Sons	71
Kona Thimma Reddi v The Secretary of State for India	60
Kottoora Thevan *In re*	311
Krishna Iyer v Subramania Iyer	368
Krishnayya v Ponnuswami Iyer	295
Kumaraswami Nadar v Venkatasami Goundan	242
Kumaraswami v Narayana Rao	468
Kunhan Menon v Mannan Menon	133
Lanka Rama Naidu v Lanka Ramakrishna Naidu	192
Loorthi Odayar v Gopalsami Iyer	125
Mahankali Sreeramulu *In re*	120
Mallayya v Punnamma	291
Malraju Venkataramakrishna Rao Garu v Koppuravuri Sriramulu	541
Manavikraman v Ananthanaraya Ayyan	260
Meyyappan Servai v Meyyappan Ambalam	471
Narayanan Chetty v Muthiah Chetty	575
Nataraja Pillai v Rangasami Pillai	274
Natesa Pillai v Kannammal Anni	181
Nurse v Rustomji Dorabji	353
The Official Assignee of Madras v The Official Assignee of Rangoon	580
The Offiial Assignee of Madras v Subramania Aiyar	1
The Official Assignee v Rajabadar Pillai	145
Peria Maiyana Marakayar v Subramania Iyer	255
Perumal *In re*	325
Pir Pacha Saheb v Mohammad Ruhimuddin Sahib	246
Ponnuswami Iyer and Narayanaswami Iyer v Damodar Hunsraj	82
Raghava Chariar v Krishna Reddi	32
Ramabai v. Harnabai	537
Ramchandra Raju v. Sri Raja Bhujanga Rao	46
Rama Seshayya v Sri Tripurasundari Cotton Press, Bezwada	563
Ramaswami Aiyangar v Veeraraghavachari	56
Ramaswami Naidu v Ayyalu Naidu	196
Ramaswami Reddi v Maruda Reddi	198
Rangaswami Nayaker v Alamelu Ammal	299
Ratnam Pillai v Annamalai Desikar	341

	PAGE.
Rukmani Ammal v Narasimhachariar	285
Ryrappan Nambiar v Chathu Kutty Naimbiyar	377
Sabapathy Chetty v Shanmugappa Chetty	453
Sami Chetti v Adaikkalam Chetti	179
Sankaranarayana Pillai v Rajamani	314
Sattayya Padayachi v Soundarathachi	73
The Secretary of the Board of Revenue, Madras v S R M A R Ramanathan Chettiar	42
Secretary of State for India v Kuppusamy Chetti	36
Sendattikalai Pandia Chinna Thambiar v Veerappa Naidu	460
Sengoda Goundan v Muthu Goundan	404
Sethurama Mudaliar v Mangala Goundar	494
Sithamalli Subbier v Ramanathan Chettiar	350
Somu Naidu *In re*	456
Sonachalam Pillai v Kumaravelu Chettiar	138
The South Indian Railway Company v Narayana Ayyar	802
Sreekanta Sundararamiah v Venkatasubbiah	380
Srinivasachariar v Raghavachariar	560
Sri Rajah Bommadevara Satyanarayana v Sri Rajah Bammadevara Venkata Bhashyakarlu	117
Subba Rao v Pakkiammal Nadathi	75
Subbayya Chakkiliyan v Muthiah Goundan	182
Sunkari Sitaya v Mudargaddi Sanyasi	361
Taduri Ramachandra Jagannatha Rao v Vadrevu Viswesam	590
Thirumala Reddi *In re*	40
Thirumurthy Chetty v Ponnan Chetty	51
Tirumalacharyulu v Ammisetti Venkiah	363
Vairavan Servai *In re*	401
Veeraswami Mudali v Palaniyappan	515
Vellayappa Chettiar v Ramanathan Chettiar	80
Venkatachalam Chetty v Govindaswami Nayaker	288
Venkata Kutumba Rao v Venkatappa	119
Venkata Lakshmikantarajugaru v Peda Venkata Jagannatha Raju Garu.	12
Venkatrama Aiyar v Rangiyan Chetty	258
Venkataratnam v Yanamandra Satyavati	383
Venkata Reddy v Nataraja Setti	371
Venkat Reddy v Kunjappa Goundan	391
Venkataseetharamiah v Veena Tolasi Babu	463
Venkata Seshamma v Guneswara Rao	129
Venkata Subbamma v Venkamma	52
Visvanatha Chetty v Somasundaram Chetty	131
Viswanatha Pillai v Periaswami Pillai	491

TABLE OF CASES CITED.

A

PAGE.

Abdul Hussein Khan v Bibi Sona Dero, L. R. 45 I. A. at 14 668
Abdul Lalji Moonshi v Jadub Chandra Mitter, I L R 25 C 216 333
Abdul Majeed v Kherode Chandra Pal, (1915) I L R 42 C 690 616
Abdul Rahman v Amin Sharif, (1918) I L R 45 C 780 ... 441
Abhiram Goswami v Shyama Charam Nandi, (1909) L R 36 I A 148 ; 36 C 1003 557
The Administrator General of Bengal v The Land Acquisition Collector, (1905) 12 C W N 241 at 244 ... 210, 213
Ahimsa Bibi v Abdul Kadir Saheb, (1901) I. L. R. 25 Mad. 6 ... 504, 505
Ahmed Mollo v Yusuf Haji Ajam Pepardi, (1916) 34 I C 221 ... 124
Ahmed Thambi Maraicair v Basava Maraicair, (1922) 44 M. L J 69: 46 M 123 ... 207
Albuquerque and Sons v South Indian Railway Company, (1922) 43 M L J 90 303
Alford v Vickery, 1 B and Ad 136 124
Ananta v Ramabai, (1877) I L R 1 Bom 554 ... 539
Ananthanarayana v Swaminatha Iyer, (1914) 1 L W 643 482
Andiappa Chetty v Alasinga Naidu, I L R 36 M. 68 at 70 470
Angamuthu v Ramalinga Pillai, (1920) 39 M L J 685 123
Appa v Runga, (1882) I L R 6 Mad 71 ... 591
Appayya v Ramayya, (1908) I L R 31 M. 419 : 18 M L J 229 (F B) ...33, 34, 35
Appu Thamban v Foulkes, (1919) 10 L W 445 372
Arjan Singh v Gujri, 42 I C 410 ... 180
Arumugam Chetty v Muthu Goundan, (1919) I. L. R. 42 M. 711 at 730 : 37 M L J 166 (F B) ... 28, 30, 93, 101
Arunachalam Chetty v Meyappa Chetty, (1897) I L R 21 M 91: 8 M L J 28. 294
Arunachalam Chetti v Periasami Servai, (1921) I L R 44 M 902 : 41 M L J 256 (F B). 417, 418, 426, 430, 435, 436, 443, 445
Atchayya v Sri Seetharamachandra Rao, (1913) I L R 39 M 195 : 24 M L J 112 297
Attorney-General v Carlton Bank, (1899) 11 Q B 158 at 164 ... 236
Avalappa Nayaker v Murugappa Chettiar, I L R 36 M 325 : 23 M L J 658. 264
Avanashi Chetti v Muthu Karuppan Chetti, 23 M L T 319 183
Ayya Mudali Velan v Veerayyi, I L R 43 M 812 : 39 M L J 213 130
Azeemunnissa v Ameer Unnisa Khatoon, 15 W R 285 266

B

Badri Prasad v. Madan Lal, (1893) I L R 15 A 75 (79) (F B) 31
Baijinath Prasad Singh v Tej Bali Singh, I L R 43 A 228 264
Bairab Chandra Bose v Anathnath De, (1919) 57 I C 686 297
Balabux v Rukhmabai, (1902) I L R 30 Cal 231 ... 405, 406
Balakrishna Aiyar v Muthuswami Aiyar, I L R 32 M 271 : 19 M L J 70. 147, 148, 149
Balakrishna Odayar v Vasudeva Aiyar, (1917) I L R 40 M 793, 799: 33 M L J 69 (P C) ... 132, 207
Balkrishna v Collector, Bombay " Suburban ", (1922) 25 Bom. L R 398 : I L R 47 B 699. 211, 212, 215

PAGE.

Balu Dos Narayan Singh v Muhammad Yusuf, (1921) 61 I C 823 ... 109
Balwant Singh v R Clancy, (1912) I L R 34 A 296 : 23 M L J 18 (P C). 317, 318, 321
Bangali Mal v Ganga Ram, 71 I C 431 373
Bangaru Ammal v. Vijayamachi Reddiar, I L R 22 M 175 191
Banuddin Sahib v. Arunachala Mudaliar, (1913) 26 M L J 215. 426, 430, 434, 444, 445
Bappu v Annamalai, (1922) 44 M L J 226. 577, 578, 579
Bapu v Bapu, (1911) I L R 39 M 750 : 22 M L J 419 (F B). 275, 277, 278, 279
Bapu Chand v Mogat Rao, (1896) I L R 22 B 340 ... 455
Baroda Charan Ghose v Govind Prasad Tewary, (1895) I L R 22 Cal 984. 461
Basiram Malo v Kattyani Debi, (1911) I L R 38 C 448, 450 438
Begg Dunlop & Co v Jagannath Marwari, 14 C L J 228 and 231 251
Best & Co v Deputy Collector of Madras (1916) 20 M L T 388. 210, 211, 212, 214
Bhagwan Dayal v Param Sukh Das, I L R 39 A 8. 15, 349, 365
Bhagwan v Krishnaji, (1920) 22 Bom L R 997 577, 578
Bhajahari Saha Banila v Behary Lal Basak, (1900) I L R 33 C 881 ... 52
Bhoobunessuree Dabia v Gouree Dass Turkopiunchanum, (1869) 11 W R 535 539
Bhugwan Chunder Kritiratna v Chandra Mala Gupta, (1902) I C, L J 97 I L R 29 C 773 ... 433, 484
Bijoy Gopal Mukerji v Krishna Mahishi Debi, L R 34 I A 87 : 17 M L J 154 (P C). 174, 177, 561, 609
Bijraj Neopani v Pura Sundary Dasse, (1914) I L R 42 C 56 : 27 M L J 93 (P C). 316, 321, 322
Biswanatha Prasad v Chandra Narayan Chowdhury, (1921) I L R 48 C 509 ; 48 I A 127 : 63 I C 770 (P C) 18
Black v Murray & Son, (1870) 9 Rettie 341 653
Blanchenay v Bart, 4 Q B 707 ... 111
The Board of Revenue v The Madras Export Company, (1922) I L R 46 M 360. 512
Borthwick v Malton, 15 C B 501 372
British India Steam Navigation & Co v Secretary of State for India, (1911) I L R 33 C 230. 210, 212, 213
Bubiram Chowdoury v Bishea Perkash Narayan Singh, (1897) I L R 24 C 878 464

C

Cape Brandy Syndicate v Inland Revenue Commissioners, (1921) 1 K B 64, 71. 218, 226, 235
Chamiyappa Taragan v. Rama Aiyar, (1920) 40 M L J 65 at 76 362
Chandan v Bishan Singh, (1910) I L R 33 A 630 : 8 A L J 798 347
Chandramani Koer v Basdeo Narain Singh, (1918) 4 P L J 57 451
Chandu v Kambi, (1885) I L R 9 M 208 340
Chandu v Cutttyil Rayiru, (1922) 42 M L J 280 123
Chantan v Mathu, (1919) I L R 39 M 657 324
Chappan v Paru, (1912) I L R 37 M 420 ... 340
Charles James Parington v The Attorney General, L R 4 A C (Eng and Ir) 100. 227
Chatter Singh v Tej Singh, (1920) I L R 43 A 104 293
Chenga Reddi v Ramaswami Goundan, 18 Cr L J 104 566

PAGE.

Chet Ram v Ram Singh, (1922) L R 49 I A 228 : 43 M L J 98 (P C) ... 91, 93
Chidambaram Chettiar v Krishna Vathiar, I L R 40 M 233 : 32 M L J 13 (F B) 241
Chidambaram Chettiar v Sami Iyer, I L R 30 M 6 : 16 M L J 427 127
Chingacham Vitil Sankaran Nair v Chingacham Vitil Gopala Menon, (1905) I L R 30 M 18 341
Chinna Meera Rowthen v Kumara Chakravarthy Iyengar, 36 I C 906 244
Chinnu Pillai v Venkatasami, (1915) I L R 40 M 477 397
Chintaman v Seth Moahn'al, 3 C P L R 32 626
Chundi Charan Mandal v Banke Behary Lal Mandal, I L R 26 C 449 333
Chunnilal Harilal v Bai Nani, (1918) I L R 42 Bom 504 ... 479, 481
Clark Brothers v Knowles, (1918) 1 K B 128 ... 372, 373
Codd v Delap, 92 L T 510 256
Comber v Layland, (1898) A C 524 373
Colonial Sugar Refining Company v Irving, (1905) A C 369 ... 276
Corporation of Calcutta v Standard Marine Insurance Company, I L R 22 C 581 ... 227, 237
Cottingham v Earl of Shewsbury, 3 Hare 627 301
Croasdell and Commel, Laird and Co., Ltd, *In re*, (1906) 2 K B 569 859

D

Davis v Barrett, (1851) 14 Beav 542 399
Debendra Mohan Roy v Sona Kunwar, (1904) I L R 26 A 291 ... 76
The Deputy Collector, Calicut Division v Aiyavu Pillai, (1911) 2 M W N 367 210
De Souza v Coles, (1868) 3 M H C R 384 ... 140, 144
Dhanipal Das v Maneshar Buksh Singh, (1906) L R 33 I A 118 ... 614, 616
Dharam Kunwar v Balwant Singh, (1912) I L R 34 A 398 : 23 M L J 200 (P C) ... 54
Dinobundu Shaw Chowdhury v Jagmaya Dasi, L R 29 I A 9 : 12 M L J 73 (P C) ... 165, 168
Dodda Sankappa v Sakravva, (1916) 36 I C 831 451
Doe v Chaplin, 3 Taunt 119, 120 124
Doe de Roberts v Roberts, (1819) 3 B and Ald 367 301
Doe et Kindersly v Hughes, 7 M and W 139 124
Doe v Summereet, 1 C and M 283 ... 124
Daraiswami v Chidambaram Pillai, (1923) 45 M L J 413. 107, 108, 110, 112, 116
Drupati Bibi v Ramrach Pal, (1909) I L R 31 A 527 442
Durapati Bibi v Ramrach Pal, (1909) I L R 31 A 527 434
Durga Sundari v Ramakrishna Poddar, (1913) 18 C L J 162 562
Dwarkadas v Krisha Kishore, (1921) 61 I C 628 480

E

Eda Punnayya v Jangala Ramakottayya, (1920) M W N 1 349
Elumalai Chetti v Balakrishna Mudali, (1921) 41 M L J 297 298
Emerson v Davies, (1843) 3 Story U S Rep 768 646
Emperor v Romeshchandra Gupta, (1917) 22 C W N 168 461
Empress of India v Kaliprosonno Doss, (1886) I L R 14 C 245 327
Endar Lala v Lallu Hari, 7 B H C R (Appellate) 111 ... 522
Ezra v Secretary of State for India, (1905) I L R 32 C 605 (P C) 210, 213, 215

F

Fakirchand Motichand v Motichand Harruckchand, I L R 7 B 438 94
Fazal Imam v Motta Singh, (1884) I L R 10 C 549 455

G

PAGE.

Galloway v London Corporation, (1866) L R 1 H L 34 ... 171
Ganapathi Mudaliar v Krishnamachari, (1922) 43 M L J 184 ... 109, 110
Ganapathi v Chathu, (1889) I L R 12 M 223 ... 379
Ganesh Rao v Tuljaram Rao, (1913) I L R 36 M 295 : 25 M L J 150 (P. C.) 317
Gangabai v Khashabai, I L R 23 B 719 179
Ganu Singh v Jangi Lal, I L R 26 C 531 441
Gardner v Lucas, (1878) L R 3 A C 582 at 603 275
Ganesha Iyer v Amirthaswami Odayar, (1918) M W N 892 ... 341
Gharibullah v Khalak Singh, (1902) I L R 25 A 407 (P C). 316, 317, 321, 322
Gibbons, *In the matter of*, I L R 14 C 42 (F B). 457, 458, 462
Girdhari Lal's case, (1875) L R 1 I A 321 92, 95, 96, 592
Godavarty Sundaramma v Godavarty Mangamma, 8 L W 88 347
Gokal Chand v Sanwel Das, I L R 1 Lah 348 141
Gokuldoss v Rambux Seochard, L R 11 I A 126 ... 165, 168
Gomathi Ammal v Kupputhayi Ammal, (1903) 14 M L J 175 ... 287
Goneschandra Adak v Banwari Lal Roy, (1912) 16 C L J 86. 426, 434, 435, 441, 445
Good Title v Bad Title, 9 Dowl 1009 111
Gopalacharyulu v Subamma, (1919) I L R 43 M 487 38 M L J 493 ... 477, 481
Gopala Dasee v Rami, (1921) I L R 44 M 946 ... 501
Gopala Iyer v Ramaswamy Sastrigal, (1907) I L R 31 M 49 ; 17 MLJ 603. 464
Gopal Chunder Chatterjee v Gunamani Dasi, (1892) I L R 20 Cal 370 ... 107, 111
Gopi Rabai v Dattaraya, I L R 21 B 366 191
Goverdhana Doss v Veerasami Chetti, (1902) I L R 26 M 537 ... 396, 397
Govind Krishna Gujar v Sakharan Narayan, (1904) I L R 28 B 383 at 389... 31
Govinda Pillai v Dasai Goundan, 41 M L J 423 454
Gray v Harris, (1862) 21 L J Exch 160 230
Green v Beach, L R 8 Exch 208 ... 372
Gunjeshwar Kunwar v Durga Prasad Singh, L R 44 I A 229 ; 34 M L J 1. 173
Gunnian v Kamakshi Iyer, (1902) I L R 26 Mad 339 489

H

Hajee Shaik Meera Rowther v The President of the Corporation of Madras, (1909) I L R 33 Mad 82 ... 512
Hakeem Muhammad v Shaik Davood, (1915) I L R 39 M 1010 : 29 M L J 526 ... 60
Hakeem Pattu Muhammad v Shaik Davood, (1915) I L R 39 M 1010 29 M L J 525 58
Hall and others *Re*, (1888) 21 Q B D 137 232
Hanuman Prasad Panday v Mussumad Baboee, (1856) 6 M I A 401 ... 592
Hanumanth Kashinath v Ganesh Annaji, (1919) I L R 43 B 612, 629, 90, 97, 98, 103
Harendra Lal Roy v Hari dasi Debi, (1914) I L R 41 C 972 : 27 M L J 80 (P C) 17, 18
Hari Das Pal v Municipal Board, Lucknow, (1913) 22 I C 652 210
Hem Chander Choudhry v Brojo Sundari Debee, (1881) I L R 8 C 89 455
Het Ram v Shadi Ram, (1918) I L R 40 A 407 395
Hogg v Scott, (1874) L R 18 Eq 444, 458 648
Hook v Administrator-General of Bengal, (1921) I L R 48 C 499 386
Hyatt, *In re*, 38 Ch D 609 265, 266
Hyde v Johnson, 2 Bing N C 776 231

I

Imambandi v Mutsaddin, (1918) I L R 45 Cal 878 : 35 M L J 422 (P C) 501
V A Istoop v K Ayappan, (1913) 16 I C 435 12

J

PAGE.

Jacobs v Booths Distillery Co, 5 L T 262 ... 256
Jagadamba Chowdhrani v Dakhina Mohun, (1886) L R 13 I A 84 602, 605, 608
Jamna Doss v Sabapathy Chetti, (1911) I L R 36 M 138 : 21 M L J 1074 ... 280
Janardhan Pandurang v Gopal, (1868) 5 B H C R (A C J) 145 ... 539, 540
Jarrold v Houlston, (1857) 3 K & J 708 653
Jenkins v Turpin, (1882) L R 13 Q B D 505 310
Jivaraju v Purushotam, (1883) I L R 7 M 171 372
Jogi Das v Ganga Ram, (1917) 21 C W N 957 (P C) 91, 103
Jones v Stone. (1894) A C 122 256
Joy v Hadley Cited in 22 Ch D 571 352
Jugdeo Singh v Habibullah Khan, (1907) 6 C L J 612 ... 397
The Justices of the Peace for Calcutta v The Oriental Gas & Co, (1872) 8 Beng L R 433 140

K

Kamal Kutti v Ibrayi, (1901) I L R 24 M 658 477, 482
Kamayya v Mamayya, (1917) 32 M L J 484 301
Kamayya v Papayya, (1916) I L R 40 M 259 . 32 M L J 477 ... 409
Kameswaramma v Venkatasubba Rao, (1914) I L R 38 M 1120. 594, 595, 596, 597
Kamisetti Subbiah v Katha Venkatasamy, (1903) I L R 27 M 355 ... 372, 373
Kandaswami Goundan v Kuppu Mooppan, (1919) I L R 43 M 421 : 38 M L J 203 90
Kandaswami Reddi v Suppammal, (1922) I L R 45 M 443 42 M L J 263. 3, 9
Kangayya Gurukkal v Kalimuthu Annavi, (1903) I L R 27 M 526 : 14 M L J 61 (F B) 59, 60
Kanyalal v Paramasukdoss, 16 L W 608 ... 141
Karri Venkatareddi v Chelluri Satyanarayanamurthi, (1920) 40 M L J 473. 591, 596
Kasi Chetty v Srimath Devasikamoni Nataraja Desikar, (1913) M W N 181 342
Kasi Viswanatha Chettiar v Ramaswami Athitha Nadar, (1919) 35 M L J 441 363
Kasthuri Chetti v Deputy Collector, Bellary, I L R 21 M 269 ... 157
Kasturi Pillai v Municipal Council, Erode, (1919) I L R 43 M 282 : 37 M L J 618 210
Kavali Sankara Rao v Ramakrishnayya, (1923) 46 M L J 184 323
Kayarohanan Pathan v Subbaraya Thevan, (1913) I L R 38 Mad 250 539, 540
Keith v Butcher, 25 Ch D 750 870
Kelu Nambiar v Chathu Nambiar, (1919) 9 L W 84 528
Kerala Varma Valiya Rajah v Shangaram, (1892) I L R 16 M 452 455
Khatubai v Mahomed Hagi Abu, (1922) 50 I A 108 : 44 M L J 35 607
Khiarajamal v Daim, (1904) I L R 32 C 296 at 312 (P C) 114
Khimji Vassonji v Narsi Dhanji, I L R 39 B 682, 714 ... 367
Khunni Lal v Gobind Krishna Narain, L R 38 I A 87 : 21 M L J 615 (P C). 174
Kishen Chunder Ghose v Ashoorun, (1863) 1 Marsh 647 ... 114
Kishen Singh v Chhajju Singh, (1922) I L R 45 A 90. 97, 98. 99. 103
Kormayya v Krishnanna Naidu, (1893) I L R 17 M 165 : 3 M L J 296 455
Kosiri Suraparaju v Maudapaka Narasimham, (1914) 1 L W 932 445
Kotirajudu v Venkataratnam, (1919) 38 M L J 320 ... 490
Kovvuri Thirupathi Raju v Kovvuri Venkataraju, (1917) 40 I C 418 ... 341
Krishna Das Roy v The Land Acquisition Collector of Pabna, (1911) 16 C W N 327 : 13 I C 470 210. 213
Krishna Iyer v Shamanna, (1912) 23 M L J 610 578, 579
Krishnamachariar v Mangammal, (1902) I L R 26 M 91 409

PAGE.

Krishnammal v Krishna Iyengar, (1912) 23 M L J 51 215
Krishna Reddi v Thanikachala Mudali, 45 M L J 153 141
Krishnasami v Varadaraja, (1882) I L R 5 Mad 345 ... 519
Krishnaswami Konan v Ramaswami Iyer, (1899) I L R 22 Mad 519 : 9 M L J 127. 593, 594, 595, 596
Krishnaswami Mudaliar v Official Assignee of Madras, (1903) I L R 26 M 673 ... 434
Krishnayya v Guruvayya, 41 M L J 503. 147, 148, 149
Kshetrabaro Bissogi v Sobhanapuram Harikrishna Naidu, (1910, I L R 33 Mad 340 : 20 M L J 417 ... 524, 525
Kulasekhara Nayaker v Jagadambal Ammal, I L R 42 M 362 : 36 M L J 351 (F B) ... 141
Kunhammad Haji, *In re*, (1923) 44 M L J 450 : I L R 46 M 382. 459, 460, 462
Kunhan v Moorthi, (1910) I L R 34 M 406 : 20 M L J 951 ... 123, 124
Kunhimaikutty Beari v Helekota Aisabi, (1920) 13 L W 434 58
Kunhi Umah v Amed, I L R 14 M 491 260
Kunhuni Panikkar v Raman, 10 L W 427 124
Kunja Behary Bardhan v Gost Behary Bardhan, (1917) 22 C W N 66 51
Kuri Veera Reddi v Kuri Bapi Reddi, (1905) I L R 29 M 336 362

L

Lachmi Amma v Janani Jayam Nambiyar, (1893) 4 M L J 183 451
Lachmi Narain Marwari v Balmakund Marwari, (1920) 6 Pat L J 116 360
Lakshmanan Chetti v Muthayya Chetti, (1920) 40 M L J 126 397
Lakshmappa v Ramava, 12 Bom H C R 364 664
Lakshmi Achi v Subbarama, I L R 39 M 488 : 28 M L J 491 180, 182
Lakshmi Chettiar v Govindarajulu Naidu, 8 M L T 349 ... 594
Lakshminarasimha Somagiar v Ramalingam Pillai, (1920) 39 M L J 319. 64
Lakshminarasimham v Venkataratnayyamma, (1921) 30 M L T 334 489
Lamb v Evens, (1893) 1 Ch 279 ... 645
Latifa Bi v Mottai Ammal, (1922) 44 M L J 271 : 46 M 836. 408, 409, 410
Laxmipathaya v Ramachandra, (1916) 31 M L J 311 200
Lewis v Hillman, (1852) 3 H L C 607 at 630 534
Longonan v Winchester, (1809) 16 Ves 269, 271 ... 649, 650
Luchmeshar Singh v Dook Mochan Jha, (1896) I L R 24 C 677 60
Lyallpur Sugar Co v Mulraj, 65 I C 473 137

M

Mackenzie & Co v Long Moir & Co, I L R 5 B 584 137
Macrae v Goodman, 5 M P C 325 ... 399
Madhava Rao Woman Saundalgekar v Raghunath Venkatesh, (1923) L R 50 I A 255 : 47 Bom 798 (P C) 558
Madhavi Ammal v Kunhi Pathumma, (1899) I L R 23 M 510 76
Madho Lal v The Emperor, (1908) 13 C W N 1211 403
Madhusudan Das Mohant v Iswara Dayi, (1921) I L R 48 C 341 91, 103
Madhusudan Singh v Rooke, L R 21 I A 164 ... 173
Madras and Southern Mahratta Railway Company Limited v Bhimappan, (1912) 23 M L J 511 305
Mahadeo Prasad v Bindeshri Prasad, I L R 30 A 137 ... 180
Mahadeva Aiyar v S T Ry Co, (1921) I L R 45 M 135 : 42 M L J 202 (F B) 304, 308
Mahalakshmamma v Vemi Reddi, (1922) 44 M L J 60 562

PAGE.

Maha'akshmi v Subbarayudu, (1922) 17 L W 429 ... 566
Maharaja of Bobbili v Zamindar of Chundi, I L R 35 All 108 21 M L J 593 264
Maharaj Narain v Banoji, Vol. 42, Punjab Record for 1907, p 147 666
Mah Nhim Bwin v. U. Shuv Gone, (1914) L R 41 I A 121 27 M L J 41 ... 624
Mahomed Ibrahim Hossein Khan v Ambika Pershad Singh, L R 39 I A 68 : 22 M L J 463 (P C) 165, 168
Mahomed Jafar v Mahomed Ibrahim, I L R 24 M 243 247
Majanath Ali v Mujafar Ali, (1923) 45 M L J 791 490
Makbool Ahmed Choudry v Bazle Sabhan Choudry, I L R 25 C 609 ... 333
Malli Karjan v Narahari, (1901) I L R 25 B 337 (P C). 105, 108, 112, 113
Mammadi Venkatiah v Boganatham Venkatasubbiah, (1921) 42 M L J 51.. 49
Manecthar Bakhsh Singh v Shadi Lal, (1909) L R 36 I A 96 : 19 M L J 438. 615
Mangal Sen v Muhammad Hussain, (1915) 27 I C 786 405
Mangalur Sivaramayya v Singumahanti Bhujanga Rao, 18 M L T 200 243
Mani Mohan Mandal v Ramtaran Mandal, (1915) I L R 43 C 148 ... 219, 229
Manindra Chandra Nandi v Barada Kanta Chowdhry, I L R 30 Cal 112 at 116 ... 566
Maniram Seth v Seth Rupchand, (1906) I L R 33 C 1047 : 16 M L J 300... 3, 8
Mani Singh Mandhala v Nawab Bahadur of Murshidabad, I L R 46 C 695 110
Marivitti Amma v Puthiam Kunnot Cherikot, (1906) I L R 30 M 215 477
Mari Raman Nair v Narayanan Nambudripad, (1902) I L R 26 M 461 ... 123
Maruthamalai v Palani, (1912) I L R 37 M 535. 16, 21, 365
Maugham, *In re*, Ex parte Maugham, (1888) 21 Q B D 21 (23) ... 582
Mayandi Chettiar v Chokkalingam Pillai, (1903) L R 31 I A 83 : 27 M 291 (P C) ... 558, 559
Mc Pherson v Watt, (1877) 3 A C 254, 266 534
Meenakshi Achi v Chinnappa Udayan, (1901) I L R 24 M 689 477
Meghraj v Bidyabati Koer, (1912) 21 C L J 279 ... 360
Midnapore Zamindary Company v Appyasami Nayaker, (1918) I L R 41 Mad 749 : 34 M L J 563 ... 523, 525
Midnapore Zamindary Company v Naresh Narayan Roy, (1921) I L R 48 Cal 460 200, 539
Minakumari Bibi v Bijoy Singh Dudhuria, I L R 44 Cal 662 : 32 M L J 425 (P C) ... 128
Mir Sarwarjan v Fakhruddin Mahamed Chowdhry, (1911) I L R 39 Cal 232 : 21 M L J 1156 (P C) 578, 579
Mizaji Lal v Partab Kunwar, (1919) I L R 42 A 169 51
Moffat and Paigne v George Gill & Sons, 86 L T 465, 470 649
Mohant Bhagaban Ramanuj Das v Mohunt Raghunandan Ramanuj Das (1895) L R 22 I A 94 539, 540
Mohesh Narain Moonshi v Taruck Nath Moitra, (1892) L R 20 I A 30 603
Monohar Lal v Jadunath Singh, I L R 28 A 585 349
Moore *In re* (1907) L R 2 Ch 304 ... 265, 267
Moro Raghunath v Balaji Trimbak, (1888) I L R 13 B 45 400
Motilal v Surajmal, (1904) I L R 30 B 167 ... 85
Nohammad Rowther v Abdul Rahiman Rowther, (1922) I L R 46 M 135.. 294
Muhammad Umar Khan v Muhammad Niaz-ud-din Khan, (1911) 39 I A 19 : 22 M L J 240 ... 606, 609
Mulla Veettil Seethi v. Achuthan Nair, 21 M L J 213 (F B) 260
Munia v Perumal, (1911) I L R 37 M 390 467

PAGE,

Munlappa Chettiar v Vellachamy Hannadai, (1918) M W N 853 ... 57
Municipal Council of Cocanada v The 'Clan' Line Steamers, Ltd, (1918) I L R 42 Mad 455 : 36 M L J 226 ... 508, 513
Mulnilal v Jagannath, (1915) 33 I C 735 197
Musahar Sahu v Lala Hakim, I L R 43 Cal 521 128
Mussammat Jatti v Banware Lal, (1923) 45 M L J 355 ... 405
Mussammat Lachmibate Kumari v Nana Kumar Singh, (1920) 5 Pat L J 400 451
Mussammat Nanomi Babuasin v Modun Mohun, L R 13 I A 1 28
Muthia Chettiar v Bava Sahib, (1914) 27 M L J 606 110
Muthu Krishna Pillai *In re*, (1902) I L R 26 M 190 280
Muthu Pillai v Muthu Pillai, (1922) M W N 831 451
Muthu Pillai v Veda Viyasa Chariar, (1920) 12 L W 277 ... 200, 528
Muthuswami Aiyar v Nainar Ammal, (1918) 7 L W 191 ... 519, 521
Muthuswami Mudali v Veeri Chetti, (1906) I L R 30 M 382 : 17 M L J 266 (F B) 275, 276, 277, 280
Muthuswami Swamiar v Somoo Kandiar, (1920) I L R 43 M 869 : 39 M L J 438 186, 187, 189, 323
Muthu Vaduganadha Tevar v Dora Singha Thevar, I L R 3 M 290 286
Muttayan v Zamindar of Sivagiri, (1882) I L R 6 M 1 593
Muttuvelayuda Pillai v Parasakti, (1860) S D A Mad 239 ... 539
Mylappa Chettiar v Aga Mirza Mohammad Shirazee, (1919) 37 M L J 712 85, 373

N

Nachiappa Chetty v Chinniah Ambalam, (1916) 4 L W 362 15, 365
Nagathal v Arumugham Pillai, (1923) 44 M L J 362 77, 499
Naina Maracayar v Somasundaram Chettiar, (1920) 11 L W 593 ... 373
Nanomi Pabuasin v Modun Mohun, (1885) L R 13 I A 1 13 C 21, 35 ...89, 90, 97
Narasammal v The Secretary of State for India, (1915) I L R 39 Mad 885. 507
Narayana Aiyar v Biyaii Bivi, (1921) 41 M L J 557 363
Narayana Mudali v Raghavammal, (1908) 18 M L J 462 76
Narayana Rao v Venkatasubba Rao, (1919) 38 M L J 77 578
Natabar Ghose v Adya Nath Biswas, (1922) 37 C L J 415 : 27 C W N 675 . 328
National Telephone Co., Ltd v Postmaster General, (1913) A C 546 203
Navakoti Narayana Chetty v Logalinga Chetty, (1909) I L R 33 M 312 : 19 M L J 752 467
Neelachalam v Kamarazu, (1903) 13 M L J 438 490
Neelu Neithiar v Subramania Moothan, (1919) 11 L W 59 ... 105, 109
Newcomb v De Ross, (1859) 2 E F 271 372
Nistariny Debya v Brahmomoyi, (1890) I L R 18 C 45 ... 386
Nundo Lall Bhuttacharjee v Bidhoo Mookhy Debee, (1919) I L R 13 Cal 17 ... 528
Nuzhatud Dowla Abbas Hussain v. Mirza Kurratulland, (1903) I L R 31 C 186 387

O

Official Assignee of Madras v Ramachandra Iyer, (1912) I L R 46 M 54 43 M L J 569 ...91, 94, 99
Official Receiver of Trichinopoly v Somasundaram Chettiar, (1916) 30 M L J 415 186, 187, 319, 323
Oolagappa Chetti v Arbuthnot, (1875 L R 1 I A 268 273

P

PAGE
Pahladi Lal v Mussammat Laralti, (1918) I L R 41 A 22 ... 18
Palamalai Mudaliar v The South Ind'an Export Company, I L R 33 M 334 : 20 M L J 211 126, 127, 128
Palaniammal v Muthuvenkatachala Maniagaran, (1917) 33 M L J 759 ... 405, 406
Palaniappa Chetty v Annamalai Chetti. (1902) I L R 27 M 223 : 14 M L J 74 ... 277, 280
Palaniappa Chetty v Deivasikamony Pandara, (1917) L R 44 I A 147 : 40 M 709 : 33 M L J 1 ... 557
In Pallonji Shapurji Mistry v Edward Vaughan Jordan, (1888) I L R 12 B 400 ... 433
Panchalu Reddi v Chinna Venkata Reddi, (1918) I L R 42 M 96 : 35 M L J 686 ... 277
Parameswara Iyer v Land Acquisition Collector, Palghat, (1918) I L R 42 M 231 : 36 M L J 95 210, 211, 212, 213, 214
Paree Kunhammed, *In re*, (1902) I L R 26 M 116 280
Parrappath Chinna v Sankuni Menon, (1919) 37 M L J 361 324
Payyidanna v. Lakshmi Narasamma, I L R 38 M 1076 ... 110
Peda Venkanna v Sreenivasa Dikshathulu, (1917) I L R 41 M 136 : 83 M L J 519 90, 591, 595, 596, 597
Periaswami Mudaliar v Seetharama Chettiar, (1903) I L R 27 Mad. 243 : 14 M L J 84 (F B) 593
Perkins, *In re*, (1890) 7 Moor 78 ... 582
Phoolbas Koonwar v Lalla Jogeshar Sahoy, (1875) 1 C 226 at 242 (P C)... 436
Pingala Lakshmipathi v Bommireddipolli Chalamayya, (1906) I L R 30 Mad 434 : 17 M L J 101 489
Ponnamma v Arumugam, (1905) A C 383 409
Ponnappa Pillai v Pappu Iyengar, (1881) I L R 4 M 1 593
Prasada Naidu v Veerayya. I L R 41 M 849 442
Prem Chand Dey v Mokheda Debi, I L R 17 Cal 699 (F B) 252
Prob v Wiggins, (1836) 3 Bing (N C) 230 ... 301
Pryce v Monmouthshire Canal and Railway Companies, L R 4 A C 197... 232
Pnblic Prosecutor v Raver Unnithiri, (1914) 26 M L J 611 277
Punnayyah v Viranna, (1922) I L R 45 M 425 : 42 M L J 429 17

Q

Queen Empress v C P Fox, I L R 10 B 176 (F B) ... 457, 462
Queen Empress v Dalip, (1896) I L R 18 A 246 45
Queen Empress v Durga Charan, I L R 7 All 672 461
Queen Empress v Ganga Ram, (1894) I L R 16 A 136 66
Queen Empress v Gungadin, (1899) I L R 22 A 118 : 19 M W N 218 403
Quinn v Leathon, (1901) A C 495, 506 88

R

Raghavachari v Srinivasa Raghavachari, (1916) I L R 40 M 388 : 31 M L J (F B) 575 ... 467, 468
Raghava Mudaliar v Narayanaswami Mudaliar, (1893) 4 M L J 88 ... 562
Raghunath Das v Sundar Das, (1914) I L R 42 Cal 72: 27 M L J 150 (P C) 107, 108, 111, 115, 116, 117
Raghunath v Sheolal, (1917) 39 I C 849 ... 370
Raghunathaswami Aiyengar v Gopaul Rao, (1921) 41 M L J 547 108, 109, 116
Rai Charan v Biswanath, (1914) 20 C L J 107 409
Raja Brij Narain Rai v Mangala Prasad, (1924) 46 M L J 23 595

PAGE.

Rajagopalan v Subbarama Iyer, (1919) M W N 356 • 317
Rajah of Kalahasti v Achigadu, I L R 30 M 454 : 17 M L J 367 264
Rajah of Kalahasti v Sree Mahant Prayag Dossjee Varu, 30 M L J 391 ... 266, 268
Rajammal v Authiammal, (1909) I L R 33 M 304 : 20 M L J 519 290
Rajan Chetty v Seshayya, (1894) I L R 18 M 236 (F B) 66
Rajani Kumar Das v Gawe Kishore Shaha, I L R 35 C 1051 at 1053 ... 126, 128
Raja Rajeswara Sethupathi v Thiruneelakantan Servai, 44 M L J 217 240
Raja Shri Shiva Prasad v Banmohan, I L R 1 Pat 387 ... 261
Raja Venka Nayanim Varu v. Raja Thimma Nayanim Varu, 27 M L J 656 191
Rajjab Ali v Emperor, I L R 46 C 60 ... 458, 459
Ramachandra Iyer v Sundaramuithi Mudali, (1893) 4 M L J 9 579
Ramachandra Padayachi v Kondayya Chetty, (1901) I L R 23 M 656 ... 594, 595, 596, 597
Ramakrishna Das Surrowji v Surjunnissa Begam, (1880) I L R 6 C 129, 133 (P C) ... 429, 432
Ramakrishna Naidu v Krishnaswamy Naidu, (1919) 36 M L J 641 528
Ramanunni Kurup v Raman Somayajipad, (1923) 32 M L T 107, 111 14
Rama Rao v Rajah of Pittapur, I L R 42 M 219 : 36 M L J 169 130
Ramaswami Chetti v Doraiswami, (1923) 44 M L J 299 15, 365
Ramaswami Chetti v Madura Mill Company, Ltd, (1916) 1 M W N 265 ... 34
Ramaswami Chetti v Perumal, (1923) 44 M L J 299 ... 16
Ramaswami Nadan v Ulaganatha Goundan, (1898) I L R 22 M 49 (63) : 8 M L J 312 (F B) ... 31, 593
Ramaswamy Goundan v Muthu Velappa Goundan, (1923) I L R 46 M 536 : 44 M L J 1 207
Ramaswamy Iyer v Ponnuswami, (1922) M W N 526 301
Ramaswamy Odayar v Chakrapani Chettiar, (1907) 17 M L J 488 ... 434
Ramchand Manjimal v Goverdhandas Vishandas Ratanchand, (1920) I L R 47 C 918 358
Ramchand v Pitam Mal, (1888) I L R 10 A 506 : 8 A W N 195 ... 436, 441
Ram Dhun Dhur v Romesh Chunder Chowdhry, (1883) I L R 9 C 406 35
Ramedi v Chunder Bali Bibi, (1917) 44 I C 399 18
Ram Kinkar Tiwar v Sthithi Ram Punja, (1917) 27 C L J 528 ... 108, 109
Ramkrishna Naidu v Krishnaswami Naidu, (1918) 36 M L J 641 200
Ramanath v Parabhu Dayal, (1921) 65 I C 661 351
Ram Prasad v Bhikari Das, (1903) I L R 26 A 464 ... 396
Ramsumran Prasad v Govind Das, L R 49 I A 387 : 41 M L J 751 (P C)... 174
Ram Sumran v Schibzada Bijai Pratap Narain Singh, (1885) 5 A W N 347 500
Ramunni v Kerala Varma Valiya Raja, I L R 15 M 166 124
Ranchod Narayan v Ajoobai, (1907) 9 Bom L R 1149 539
Ranganayakalu Aiya v Subbayyan, (1909) 5 M L T 71 ... 3
Ranga Rao v Emperor, (1912) 23 M L J 371 457, 459, 460
Rangasamy Naicken v Komarammal, (1902) I L R 26 M 484 396
Rangaswami Naidu v Sundararajulu Naidu, (1916) 31 M L J 472 ... 406, 495
Rangayya Pillai v Narasimha Aiyangar, (1918) M W N 672 ... 58, 60
Rangayya Reddi v Subramania Iyer, (1917) I L R 40 Mad 366 : 32 M L J 575 577
Rani Kunno Dai v B J Lacy, I L R 19 A 235 ... 266
Rashid-un-nissa v Muhammad Ismail Khan, (1909) I L R 31 A 572 : 19 M L J 631 (P C) ... 15
Rathna Naidu v Aiyana Charlar, (1890) 18 M L J 699 594, 595, 596
Ratnamasari v Akilandamma, (1902) I L R 30 M 309 605

PAGE.

Ravenga v Mackintosh, (1824) 2 B and C 593 355
Reddi Venkatasubbiah v Tangator Subbiah, (1915) M W N 159 424
Rewa Mahton v Ram Kishen Singh, I L R 14 C 18 113
Rex v Manchester Jusstices, (1899) 1 Q B 571 at 594 207
Rex v Roxburgh, 12 Cox Cr. Cases, 8 ... 45
Ripon Press and Sugar Mills, Ltd v Nama Venkatrama Chetty, (1918) I L R 42 Mad 33 : 35 M L J 256 564
Robey v Snacfell Mining Company, (1878) 20 Q B 152 ... 373
Rose v Woodford, (1894) 1 Ch 38 ... 181
Ruldu Singh v Sanwal Singh, I L R 3 Lah 188 141

S

Sabapathy Chetty v Ponnuswami Chetty, (1915) 28 I C 365 317
Sabir Hussain v Emperor, (1921) 19 A L J 487 121
Sahib Thambi Maracayar v Hamid Maracayar, (1911) 2 M W N 534 ... 480, 482
Sahuram Chander v Bhup Singh, (1917) L R 44 I A 126 : 33 M L J 14 (P C) : 39 A 437 24, 27 30, 90, 92. 95, 96, 97, 595
Sama Rao v Vanaji Vapujee, (1922) I L R 46 M 64 : 43 M L J 745 91
Samuel v Newbould (1906) A C 461 617
Sankar Bharate v Narasimha Bharati. (1922) I L R 47 B 106 858
Saruswati Pattack v The Land Acquisition Deputy Collector of Champaram, (1917) 2 P L J 201, 204 ... 213, 215
Saratmani Debi v Radhakrishna Banerjee, (1909) 10 C L J 336 360
Sarat v Ram, 35 C L J 77 ... 132
Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta v Mussammat Bundho Raee, (1869) 1 N W P H C R 81, 96, 97 432
Sarodakanto Dass v Gobid Mohand Das, (1910) 12 C L J 91 at 97 387
Sarvi Begum v Haider Shah, (1917) 9 A L J 12 ... 119
Satischandra Mitra v Jogendranath Mahalanabis, (1917) I L R 44 C 345. 57
Satya Sri Ghose Lal v Kartik Chandra Dass, (1912) 15 C L J 227 557
Savitri Antarjanam v Raman Nambudripad, (1900) I L R 24 Mad 226 123
The Secretary, Board of Revenue (Income tax), Madras v Ripon Press and Sugar Mills Company, (1923) I L R 46 Mad 706 : 44 M L J 523. 507, 513
Secretary of State for India v Appa Rao, (1923) 45 M L J 156 65
Secretary of State for India v Baswa Singh, 17 I C 764 ... 157
Secretary of State for India v Chellikani Rama Rao, I L R 39 M 617, 31 M L J 324 (P C) ... 157
Secretary of State for India v Luchmeswar Singh, (1890) L R 16 I A 6 : 16 Cal 233 (P C) ... 549
Secretary of State for India v Venkatesalu Naidu, (1906) I L R 30 M 113. 66, 67
Seshagiri Rao v Srinivasa Rao. I L R 43 M 313 : 38 M L J 62 108, 110, 114
Seshayyar v Saraswathi Ammal, (1920) 12 L W 541 ... 54
Sethuratnam Iyer v Venkatachala Gounden, (1919) L R 47 I A 76 : 43 Mad 567 : 38 M L J 476 (P C) ... 521, 550
Settappa Goundan v. Muthiah Goundan, (1908) I L R 31 M 268 409
Sewdut Roy v Sree Canto Maity, (1906) I L R 33 C 639 at 643 ... 433, 442
Sham Dei v Balgit Singh, (1909) I L R 32 A 119 397
Sham Sundar Lal v Achhan Kunwar, L R 25 I A 191 ... 173, 177
Shamu Pattar v Abdul Kadir Ravuthan, (1912) I L R 35 M 607 : 23 M L J 321 (P C) 57
Shankar Sarup v Mejo Mal, (1901) I L R 23 A 313 382
Shaw v Foster, L R 5 H L 321 296

PAGE.

Shazadi Begam v Mahbub Ali Shah, (1920) I L R 42 A 353 ... 378
Sheo Prasad Singh v Ramanandam Prasad Singh, (1916) I L R 43 C 694 : 31 M L J 77 ... 386, 387
Sheo Shankar Ram v Jaddo Kunwar, (1914) I L R 36 A 383 ... 477, 478
Shibessouree Deb v Moothooranuth Acharjo, (1869) 13 M I A 275 557
Shrinivas v. Hanmant, (1899) I L R 24 B 260 604
Shrinivas Sarjeraw v Balwant Venkatesh, (1913) I L R 37 Bom 513 607
Shunmuga Chettiar v Alagia Nambiya Pillai, (1882) 2 Weir 275 ... 461
Shyam Mandal v Sitinath Banerjee, (1917) I L R 44 C. 954 107, 112. 116
Simpson v Mc Master, (1890) I L R 13 M 344 ... 51
Sivagami Achi v Subramania Aiyar, (1903) I L R 27 M 259: 14 M L J 57 (F B) 72, 74, 193, 194, 195
Sivagnanathammal v Arunachalam Pillai, 10 M L T 490 ... 134
Sivagami Ammal v Gopala Savundram Ayyan, (1893) I L R 17 M 131 : 4 M L J 50 (F B) ... 58, 60
Sivathi Odayan v Rama Subba Aiyar, (1897) I L R 21 M 64 : 8 M L J 21. 399, 401
F L Smith & Co. v Greenwood, (1921) 3 K B 583 ...507, 511
Specific Relief Act *In the matter of* and *In the matter of* Sarafally Mamooji and Jafter Jushib, (1910) I L R 34 Bom 659 496
Spiers v Brown, (1858) 6 W R 352, 353 ... 649
Sreeram Manick v Tincouree Roy, (1870) 13 W R (F B) 9 (S C.) 4 Beng L R 63, 67 432
Sricharan v Makhan Lal, (1918) 51 I C 378 ... 57
Srimantu Raja Yarlagadda Prasada Nayudu v Srimantu Raja Yarlagadda Mallikerjuna Prasada Nayudu, I L R 24 M. 358 141, 142
Srinivasa Aiyengar v Ramaswami Chettiar, 29 M L J 12 141
Srinivasachari v Rex, 1 Weir 917 ... 810
Sripat Singh v Tagore, (1916) L R 44 I A 1 : 32 M L J 133 : 44 C 524 (P C) 89, 91, 97, 99
Sri Rammanik v Tincouri Rai, (1869) 9 Beng L R 63 (F B) 438
Stratford v Ritson, 10 Beav 25 ... 273
Stuart Skinner *alias* Nawab Mira v William Orde, (1879) I L R 2 A 241. 255
Subba Aiyar v Ramaswami Aiyengar, (1921) I L R 44 M 547 : 40 M L J 209 187, 188, 319, 323
Subbammal v Lakshmana Iyer, (1914) 26 M L J 479 287
Subbarama Aiyar v Veerabhadra Pillai, (1921) 41 M L J 217 10
Subba Rao v Pakkiammal Nadathi, (1923) 46 M L J 74 499
Subbarayadu v Ramadasu, 42 M L J 301 182
Subbasari v Emperor, (1921) I L R 44 M 47 277
Subramania Chetty v Chidambara Mudaly, (1921) 41 M L J 459 50
Subramania Iyer v Shaw Wallace & Co., Madras, (1919) 38 M L J 402... 90
Subramaniam v Latchman, (1923) I L R 50 C 338 : 44 M L J 602 (P C) 296, 298
Subramania Nadan v Ramaswami Nadan, (1913) 25 M L J 563 50
Subramania Pattar v Vembammal, 14 M L J 339 190
Sukar Hajam v Oli Mohammad, (1914) 25 I C 826 52
Sukhi v. Ghulam Safdar Khan, (1921) I L R 43 A 469 (P C) ... 395
Sundar Das v Collector of Gujarat, (1922) I L R 3 Lah 349 507, 512, 513
Sundar Koer v Shan Krishen, (1906) L R 34 I A 9, 16 ... 616
Sun Life Assurance Company v The Corporation of Madras, (1922) I L R 46 Mad. 10 : 42 M L J 283 ... 506, 513
Suraj Bansi Koer v Sheo Prasad Sing, (1909) I L R 31 All. 176 (F B) 95

PAGE.

Suraparaju v Narasimham, (1914) 1 L W 932 ... 426, 435
Surappa Raju v Venkayya, (1915) M W N 908 317
Suresh Chander Waru Choudhry v Jugat Chunder Pal, I L R 14 C 204 ... 365
Suryanarayana v Patanna, (1918) I L R 41 Mad 1012 : 36 M L J 585 (P. C.) ... 517, 524
Suryanarayana v. Patanna, (1913) I L R 38 M 608 : 26 M L J 99 ... 517, 521

T

Tami Reddi v Gangu Reddi, I L R 45 Mad 281 : 42 M L J 570 ... 148, 149
Tawker & Sons v Harsookdoss Chougmull, (1923) 45 M L J 611 195
Taylor v Jones, (1875) 1 C P D 87 372
Thakur Din v Hari Das, (1912) I L R 34 All 482 (F B) 79, 80
Thakur Ishri Singh v Thakur Baldeo Singh, I L R 10 Cal 792, 802 ... 289
Thakur Tirbhuwan Bahadur Singh v Raja Rameshar Baksh Singh, (1906) L R 33 I A 156 604, 606, 607
Thangi Shettithi v Duja Sett, (1918) 35 M L J 575 ... 454, 455
Thiagaraja v Giyana Sambanda Pandara Sannadhi, I L R 11 M 77 622
Thimmanna Bhutta v Krishna Tantri, I L R 29 Mad 508: 16 M L J 413 ... 260
Tilakdhari Lal v Khedam Lal, (1921) I L R 48 C 1 (P C) ... 398
Trustees for the Improvement of Calcutta v Chandra Ghosh, L R 47 I A 45 ... 170
Tuljaram Rao v Alagappa Chettiar, (1910) I L R 35 M 1 : 21 M L J 1 (F B) 73, 140, 144

U

Umed Kika v Nagindas Narotamdas, 7 B H C R 122 ... 367
University of London Press v University Tutorial Press, Ltd, (1916) 2 Ch 601 651
Unni v Kunchiamba, (1890) I L R 14 M 26 ... 310
Upadrashta Venkata Sastrulu v Devi Seetharamudu, (1919) L R 46 I A 123 : 43 M 166 : 37 M L J 42 ... 551
Upendra Nath Hazra v Ram Nath Chowdhury, (1906) I L R 33 Cal 630, 523, 525
Upendra v Sakhi Chand, (1912) 16 C L J 3 ... 48

V

Vadla Nagiah v Valuru Divakara Mudaliar, (1917) M W N 583 57
Vairavan Chettiar v Ramanathan Chettiar, 14 L W 701 142
Varadaraja v Doraisami, (1892) I L R 16 Mad 131 ... 519, 520
Vedavlasa Iyer v Madura Hindu Labah Nidhi Co, Ltd, (1923) 45 M L J 478 195
Veeranan Ambalam v Annasami Iyer, (1911) 21 M L J 845 518, 519, 521
Velaga Mangamma v Bandlamudi, (1907) I L R 30 M 308 ... 605, 626
Velappa Goundan v Doraisami Iyer, S A No 469 of 1917 ... 519, 521
Vencata Mahalakshmamma v Ramajogi, (1892) I L R 16 Mad 271 ... 518, 520
Venkata v Ananta, I L R 16 Mad 299 174
Venkatacharlu v Kandappa, (1891) I L R 15 Mad 95 ... 518, 520
Venkata Jagannadha v Veerabhadrayya, (1921) I L R 44 Mad 643 : 41 M L J 1 (P C) ... 488, 489
Venkatanarayana Pillai v Subbammal, (1915) L R 44 I A 125 : 28 M L J 535 608
Venkata v Rama, (1884) I L R 8 Mad 249 ... 489
Venkataranga Rao v Narasimha Rao, (1913) I L R 38 M 509 : 26 MLJ 96 359
Venkata Reddi v Velappa Chetti, (1916) 5 L W 234 362

PAGE.

Venkata Row v Tuljaram Row, (1917) M W N 30 ... 350
Venkatasami Naicken v Ramanathan Chettiar, (1910) 8 M L T 409 ... 400
Venkata Sastrulu v Seetharamudu, (1918) I L R 46 Mad 166 : 37 M LJ 42 (P C) ... 517, 524
Venkatasubbiah v Venkata Seshaiya, (1918) I L R 42 M 1, 417, 418, 419, 423 426, 435, 440, 444, 445
Venkateswara Iyer v Raman Nambudripad, (1916) 3 L W 435 ... 579
Venkateswara Yettiapah Nayaker v Alagoo Mottoo Servagaren, 8 M I A 327 ... 524, 525
Venkateswarayyan v Aswatha Narayanan, (1923) 45 M L J 315 424
Venkatarayalu v Narasimha, (1880) I L R 2 M 174 ... 455
Vidyavaruthi Thirtha v Baluswami Iyer, (1921) L R 48 I A 302 : 44 M 831 ; 41 M L J 346 (P C) ... 557
Vinjamampati Peda Venkanna v Vedlamannati Srinivasa Deekshatulu, (1917) I L R 41 M 136 : 33 M L J 519 ... 28
Visvanathan Chetty v Somasundaram Chetty, (1922) I L R 45 M 875 : 42 M L J 422 107, 109. 112, 115, 116
Vizagapatam Sugar Development Co v Muthurama Reddi, (1923) 45 M L J 528 : 46 M 919 (F B) 362
Vythilinga Padayachi v Ponnuswamy Padayachi, (1921) 41 M L J 78 ... 186, 187, 189, 319, 323

W

Walian v Banke Behari Pershad Singh, (1903) I L R 30 C 1021 : L R 30 I A 182 (P C) 16
Walter v Lane, (1900) A C 539, 545, 547, 549 ... 615
Wolverhampton Waterworks Co v Hawkesford, (1859) 6 C B (N S) 336. 38
Woodward v Sarsons, 10 C P D 733 ... 493, 495

Z

Zamindar of Ettiyapuram v Chidambaram Chettiar, (1920) I L R 43 M 675 39 M L J (F B) 203 ... 253
Zamindar of Karvetnagar v Trustee of Tirumalai Tirupati Devasthanams, I L R 32 M 429 : 19 M L J 401 264

THE

Madras Law Journal Reports.

PART I.] JANUARY. [VOL. XLVI.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C. *Chief Justice* AND MR. JUSTICE KRISHNAN.

The Official Assignee of Madras ... *Appellant** (*Plaintiff*).

v.

N. Subramania Aiyar and others ... *Respondents* (*Defendants*).

The Official Assignee of Madras. *v.* Subramania Aiyar.

Indian Limitation Act, S. 19—*Acknowledgment of liability—Suit on a mortgage—Admission of the execution of the mortgage—Non-denial in the written statement by the legal representative of the mortgagor of the subsistence of the debt, whether amounts to an acknowledgment of liability—Civil Procedure Code, O.* 8, *R.* 5

Where in a suit on a mortgage the plaint alleged the execution of the mortgage and alleged further that there was due in respect of the mortgage at that date a sum which was the principal amount and arrears of interest, and in the written statement the legal representative of the mortgagor, in that capacity, admitted the mortgage in terms and dealt with the plaint, paragraph by paragraph, but did not deny the subsistence of the debt at the date of the written statement there would be an acknowledgment of liability under the mortgage in the written statement within the meaning of S. 19 of the Indian Limitation Act.

A mere statement that a debt existed at one time without anything further would not be sufficient as an acknowledgment of liability but if from the circumstances it could be inferred that the intention of the person making the statement was to convey the impression that the debt was still subsisting, the Court would be justified in holding that it was an acknowledgment of a subsisting liability within the meaning of S. 19 of the Limitation Act.

Kandaswami Reddi v. *Suppammal,* I L R 45 Mad. 443 : 42 M L J 268 foll.

Per the Chief Justice :— For the purpose of preventing the running of the statute of limitation, it would be enough, if there was such a passing over of a

*O S Appeal No. 22 of 1921. 22nd August, 1923.

The Official Assignee of Madras. v. Subramania Aiyar.

certain allegation in silence in the written statement signed by the party which in law amounts to an admission.

On appeal from the Judgment of the Hon'ble Mr. Justice Coutts-Trotter, dated 17th January, 1921 in O. S. No. 615 of 1918 passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court.

O. T. Govindan Nambiar instructed by *Short Bewes and Co.* for appellant.

C. V Ananthakrishna Aiyar for 1st respondent.

M. P. Soundararaja Aiyar for 4th respondent.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—This is an appeal from a judgment of Coutts-Trotter, J. on what is undoubtedly a difficult point under the Limitation Act. The case has been very clearly argued before us by Mr. O. T. Govindan Nambiyar for the appellant and Mr. Anantakrishna Aiyar for the respondent. The facts appear clearly from the judgment of the Court below and it is sufficient to state them shortly for the purpose of this judgment.

The Official Assignee is suing here as the representative of the estate of an insolvent, one K. R. Narayana Aiyar, who is since deceased. He was a mortgagee having obtained a mortgage in October 1894 from one Narayani Ammal for Rs. 1,000. She was a dancing girl. She died in August 1900 and she made the mortgagee the executor of her will. In that will she referred to the debt due to him, and, in applying for probate, he stated the amount of the mortgage encumbrance due by the deceased lady at Rs. 1,620. In November 1912 a suit was brought by one T. S. Kothandarama Chetti against, among others, the mortgagee. He claimed to be entitled to the mortgagee's interest in that mortgage having as he alleged purchased that interest at Court auction and he sued the mortgagee in his capacity of executor for the mortgagor, he being as such in possession of the mortgaged property, and in February 1913, he (the mortgagee) put in a written statement defending that suit. The Official Assignee, who is representing the estate of the mortgagee, has now found it beneficial to the estate to claim on that mortgage and he is met by a plea of limitation. According to the law of this country it is necessary for him in bringing this suit to show that his claim is not barred by limitation, and in order to do so he relies on two acknowledgments of liability by Narayana Aiyar on behalf of the mortgagor. The first acknowledgment relied upon is

The Official Assignee of Madras. v. Subramania Aiyar. — Sir Walter Schwabe, C. J.

contained in the affidavit by the mortgagee made by him in his capacity as executor under the will in claiming probate. He sets out in that affidavit a mortgage debt of Rs. 1,620. I am quite satisfied that the mortgage debt referred to there was the mortgage debt to himself as mortgagee. I have no doubt that that is a matter which can be proved by reason of the wording of explanation (1) to S. 19 of the Limitation Act. I am quite satisfied that strict proof of the fact was dispensed with in the Court below because the defendants would have been totally unable to suggest that there was any other encumbrance which he could have been referring to. In my judgment that admission is an admission which keeps the debt alive down to that date.

The second alleged admission is contained in the written statement of February 1913, and the learned trial Judge has held that that is not an admission sufficient for the purposes of S. 19 of the Act. I do not agree with him. An admission to prevent the running of time under the Limitation Act need not be in the full sense of the word an admission of the existence of liability at the date of the admission, if the proper inference to be drawn from the admission which is made is that it was intended to represent the debt as then subsisting. The law on the point is stated by the Privy Council in *Maniram Seth* v. *Seth Rupchand* (1), where there was a statement of what was held to amount to an admission of a debt at a time antecedent to the date of the statement, that is to say, the statement relied upon referred to the debt as having existed at a previous date. It was held under the circumstances of the case that, as the statement did not, as it would naturally if it had been a fact, do, go on to say that the position has altered since, it must be taken that the natural presumption was that the debt still continued down to the date of the statement, and that was held under those circumstances to be enough. That case has been discussed in subsequent cases by Miller, J. in *Ranganayakalu Aiya* v. *Subbayyan* (2), by the Division Bench of this Court, (Napier and Odgers, JJ.) in *Subbarama Iyer* v. *Veerabadra Pillai* (3) and finally in the recent case in *Kandaswami Reddi* v. *Suppammal* (4) by Ayling and Venkatasubba Rao, JJ. I think that the statement of the law as made by Ayling, J., and concurred in by Venkatasubba Rao, J., in the

1. (1906) I L R 33 C 1047 particularly at page 1059 : 16 M L J 300.
2. (1909) 5 M L T 71.
3. (1921) I L R 45 M 443 : 42 M L J 268.
4. (1921) 41 M L J 217.

The Official Assignee of Madras. v. Subramania Aiyar.

Sir Walter Schwabe, C. J.

latter case is certainly correct. My only doubt is whether it goes far enough, but in that case, he in effect states his interpretation of the Privy Council judgment to be that you have got to look at all the facts at the time of the statement which is claimed to be an admission and then say whether the proper inference to draw is that it was the intention to make an admission of the then existence of the debt. Now in this case the plaint in answer to which the written statement relied upon was put in alleged definitely the execution of the mortgage in October 1894 and it further alleged that there was due in respect of the mortgage at that date a sum which was equal to the principal amount and a very large arrear of interest. In the written statement the mortgagee, who was contesting the action in his capacity as executor of the mortgagor and in that capacity only, in terms admits the mortgage. He then deals with the plaint paragraph by paragraph, but, when he comes to paragraph 19 in the plaint which was in these terms: "There will be now due for principal and interest in respect of the said mortgage a sum of Rs. 2,629-4-0," he passes it over in silence. He does not suggest in any part of his written statement that the amount was no longer due, that the mortgage had been discharged in any way or the debt repaid. Under the rules applicable to pleadings in this Court, *viz.*, R. 5, O. VIII of the Civil Procedure Code of 1908, every allegation of fact in a plaint not denied specifically or by necessary implication or stated to be not admitted in the pleading of the defendant shall be taken to be admitted. The effect of that is that that written statement in law amounted to an express admission first of the existence of the mortgage debt at the date of that written statement and then that the amount due was Rs. 2,629-4-0. It is argued that the admission must be express and it is not sufficient for this purpose that it should be an admission which the law implies under the rules by reason of the absence of any denial in the written statement. Speaking for myself I do not agree. I think that for the purpose of preventing the running of the statute of Limitation it would be quite enough, if there was such a passing over of a certain allegation in silence in a written statement signed by the party making the admission which in law amounted to an admission; because he must be taken to know the law and therefore he would be making an admission at that time; for the purpose of limitation an admission made to some other person is sufficient. But, if I am wrong about that, I am quite clear that applying

the test stated by Ayling, J., in the case referred to above, that one of the circumstances to look at is to see what was being pleaded and what was being denied in the defence, and it can hardly to my mind be open to doubt that the intention of the person who signed the written statement in February 1913 was to admit the continuance of the mortgage debt at the date of that document. That being so the case is taken out of the Statute of Limitation. In my judgment, the judgment appealed against is wrong, and the plaintiff is entitled to succeed.

I think the question remains as to how much he is entitled to succeed for and I think the amount that he would be entitled to take is proved here as the amount shown in the first of the admissions *plus* interest since that date. As a result there will be the usual mortgage decree for the Official Assignee for Rs. 3,450 with costs here and in the Court below. Time for payment is six months. Interest will be at 9 per cent. till then and 6 per cent. thereafter.

Krishnan, J.

Krishnan, J. :—The decision of this appeal turns purely upon a question of law, namely one of limitation. The suit is brought to enforce a mortgage executed by one Narayani Ammal, to whom the suit property originally belonged, mortgaging the property in 1894 in favour of one Narayana Iyer. In 1900 Narayana Iyer became insolvent and whatever rights he had under this mortgage passed to the Official Assignee. This suit is brought by the Official Assignee to enforce the mortgage by sale of the property as against the representatives of the original mortgagor Narayani Ammal and others. *Prima facie*, as the learned Judge remarks in his judgment, the suit will be barred, and to save it from the bar of limitation the Official Assignee relies upon two acknowledgments and what we have to consider in this appeal is whether these acknowledgments are good acknowledgments or not under S. 19 of the Limitation Act to give fresh starting points for limitation to run. One is said to be contained in Ex. IV, a petition which Narayana Iyer, as the executor and trustee appointed under the will by Narayani Ammal, filed in 1903 for the probate of that will. In the schedule of assets and liabilities attached to that petition there is an entry to the effect, "Item 3-Amount of mortgage encumbrances Rs. 1,620." The other acknowledgment relied on is said to be contained in a written statement filed in 1913 by the same Narayana Iiyer in a suit brought in 1912 by one Kothandarama Chetti. The learned Judge who tried this case

The Official Assignee of Madras. v. Subramania Aiyar.

Krishnan, J.

has considered only the question whether the second of these acknowledgments is a good acknowledgment or not; for as he came to the conclusion that it was not, the suit failed. I take therefore, that point for consideration first.

Before dealing with the argument adduced regarding the question whether it is a good acknowledgment or not; I shall briefly state under what circumstances this written statement came to be filed, as in construing a written statement it is necessary to refer to the plaint in answer to which it was filed, and for that purpose it is necessary that we should know how the plaint came to be filed. There was one Devaraja Mudali who had a money claim against Narayana Iyer and he brought a suit in the Small Cause Court and obtained a decree against Narayana Aiyar the mortgagee. He then got the decree transferred to the City Civil Court and in execution of that decree, sold the right, title, and interest of Narayana Iyer in the mortgage and purchased it himself. Subsequently he brought a suit, as mortgagee whose rights he claimed to have obtained by this auction purchase in the City Civil Court, to enforce the mortgage against the mortgagor by sale of the property. This was in 1906. By that time Narayani Ammal was dead, she having died in 1900. In bringing the suit he made one Murugammal the legal representative of the said Narayani Ammal and conducted the suit. He obtained a decree in the City Civil Court which was confirmed in appeal, and in execution of that decree, this property was brought to sale by the Court. In that sale one Kothandarama Chetti became the purchaser in August 1911. He tried to obtain possession through Court but failed as he was obstructed by Narayana Iyer, and thereupon he brought the suit O. S. No. 425 of 1912 in November 1912 in which he claimed, first of all to recover possession of the property from the obstructor after removing the obstruction and secondly, if the Court found that he had not obtained a proper title to the property, he claimed that he had at least become the owner of the mortgage interest and therefore he should be given a decree for the mortgage amount which he stated to be Rs. 2,629 odd on that date, as against the estate. He also made certain other claims against certain other persons with which we are not now concerned. In that suit Narayana Iyer was one of the parties and the Official Assignee was also added as a party— Narayana Iyer was then representing the estate of Narayani Ammal as the executor and trustee under her will and the Offi-

The Official Assignee of Madras, v. Subramania Aiyar. — Krishnan, J.

cial Assignee was representing the mortgagee's interest that passed to him by virtue of the Insolvency of Narayana Iyer. The written statement was filed in that suit by Narayana Iyer as mortgagor and it is Ex. VI in this case. It is contended for the plaintiff that there is a sufficient acknowledgment in that written statement of the liability of the estate for the mortgage debt. The clause relied upon as containing that acknowledgment is the first clause in the written statement which runs thus " This defendant admits that Narayanamma referred to in para. 3 of the plaint, was the owner of the plaint property and that she mortgaged the same in favour of this defendant on or about the 6th October 1894, as alleged in the said paragraph. " It is contended for the other side that this is not a sufficient acknowledgment to take the case out of the bar of limitation because it merely says that there was a mortgage in 1894 and that it makes no statement whatsoever admitting any existing liability to pay the mortgage debt. It is also contended that this statement should not be taken as having been made by Narayana Iyer as representing the estate of the mortgagor, at any rate that it is uncertain whether it was made by him in his capacity as the representative of the mortgagor or in his own capacity as mortgagee, and it is argued that this is also one reason for refusing to accept the statement as a sufficient acknowledgment of the liability under S. 19 of the Limitation Act, under which the acknowledgement must be made by the debtor or on behalf of the debtor by a person duly authorised to make the same. These two arguments have been supported by the learned Judge who tried the case, but after hearing the arguments in appeal, I agree with the learned Chief Justice that there are not sufficient grounds for refusing to accept this statement in the written statement as constituting a proper acknowledgment under S. 19.

As regards the objection, that it is not clear that this acknowledgment was made by Narayana Iyer in his capacity as representing the mortgagor's interest and not in his own capacity as mortgagee, it must be remembered that he was made a party in that suit mainly as representing the mortgagor's interest, because the mortgagee's interest had already passed to the Official Assignee. No doubt there are certain statements in the written statement wherein he does refer to his interest as mortgagee also ; nevertheless I think in the main he was in the suit as representing the estate of the mortgagor ; and I think

The Official Assignee of Madras v. Subramania Aiyar. — Krishnan, J.

we are bound to give effect to any statements made by him apparently in his capacity as the mortgagor's representative and not say that it is doubtful whether he made it in one capacity or other and reject it. Where it is clear from the context, that any statement in the written statement is made by him in his capacity as mortgagor, of course we must take it that it refers to his capacity as such and not to his capacity as mortgagee though the written statement as a whole is a combined one. I have no doubt, therefore, that this argument fails, as I have come to the conclusion that the statement in paragraph (i) of the written statement may very reasonably be attributed to him as being made on behalf of the mortgagor of the estate which he was representing in that suit.

As regards the second argument, which is a little more difficult to deal with, there can be no doubt, as pointed out by the learned Chief Justice, that there is an implied admission if not an express admission in the written statement that the mortgage debt on the date of the written statement was standing at the figure of Rs. 2,629 or thereabouts ; it was so expressly claimed in the plaint against the estate. There is no denial whatever of that in the written statement, and that being so, it certainly can be inferred that the amount was admitted under O. 8, R. 5 of the Civil Procedure Code. I think the same inference may be drawn in this case also in construing the written statement for the purpose of seeing whether the acknowledgment in the first paragraph was that of a dead mortgage or of a mortgage that was then subsisting, and that we are justified in holding that he was there referring to a subsisting mortgage. The learned Judge has referred to certain other paragraphs in the written statement as showing the contrary, namely, paragraphs 6, 8 and 15, but they do not seem to me to refer to the subsisting character of the mortgage at all. All that is said in those paragraphs is that the plaintiff was not entitled to claim anything under the mortgage because Kothandarama Chetti had not got a proper title as the person who was added as the legal representative in the suit by Devaraja Mudaliar had never occupied that position at all.

Our attention has been called to the case of *Maniram Seth* v. *Seth Rupchand* (1). In that case an acknowledgment was made by a person as the representative of a deceased person called Motiram, that Motiram had an open and current

1. (1906) I L R 33 C 1047 : 16 M L J 300.

account with the defendant at the time of his death. This was treated as a sufficient acknowledgment of a subsisting liability although the acknowledgment itself was made only about a year after he died. At page 1059 their Lordships say this "The acknowledgment, to which attention has been directed, is followed in the same paragraph by the following sentence "The alleged indebtedness does not affect his (the respondent's) right to apply for probate." Stress was laid by the Civil Judge upon the word 'alleged.' He was of opinion that the word 'had' in the sentence 'for the last five years he had open and current accounts with the deceased' and the word 'alleged' were fatal to the validity of the acknowledgment. Their Lordships cannot share this opinion. The first sentence shows that there were open accounts at the death of Motiram. If nothing further is alleged the natural presumption is that they continued unsettled at the time the statement was made. The sentence which follows is perfectly consistent with this admission. The meaning is 'even if there is a balance against the respondent that does not disqualify him from fulfilling the duties of an executor' and it has been pointed out that what is relied upon here is an acknowledgment subject to the condition that an adverse balance really exists, and the condition is fulfilled in fact." In this paragraph the sentence occurs, "If nothing further is alleged, the natural presumption is that they continued unsettled at the time the statement was made." As at present advised I am not prepared to go so far as Miller, J. in thinking that their Lordships have laid down a general rule that, whenever a debt is said to have been incurred at an anterior date and no statement is made that it has been paid off, we must necessarily draw an inference that that debt is admitted to be still subsisting at the date of the acknowledgment. I am prepared to accept the interpretaion put by the ruling of this Court of Ayling and Venkatasubba Rao, JJ. in *Kandaswami Reddi* v. *Suppammal* (4), where Ayling, J., who delivered the judgment in which Venkatasubba Rao, J. concurred, says : "I can see no ground whatever for holding that their Lordships were considering anything but the circumstances of that case or intended to lay down any rule of legal inference. The presumption in that case was very strong." Then he considers how the presumption arose from the facts of that case, and then his Lordship says, "That is the meaning of the paragraph quoted taken as a whole. If the defendant had

4. (1922) I L R 45 M 443 : 42 M L J 268.

been in a position to say that the account had been settled between the 6th October, 1898 and the 20th September, 1899, he would certainly have said so ; for this would have been a much better answer to the plaintiff's objection. As he did not say so, the inference that the accounts still remained unsettled is natural and obvious." It follows then that in each case we have to consider the circumstances in which the statement was made that there was a debt and see whether it was really intended to convey an impression that that debt was subsisting at the date of the statement or not and if we can from the circumstances infer that the intention of the person making the statement was to convey the impression that the debt was still subsisting we will be justified in holding that it is an acknowledgment of subsisting liability. I do not think that a mere statement that a debt existed at one time without anything further, as was the case in Second Appeal No. 52 of 1921 to which our attention has been drawn, a decision to which I was a party—is sufficient to enable the Court to say that there is an acknowledgment of a subsisting liability even though the person who makes the statement does not go on to say that the liability has ceased. In that Second Appeal a man was being examined as a witness and he had to answer questions put to him. He had no opportunity of saying anything further than that he had executed a mortgage bond for a prior debt and he therefore said nothing ; and Spencer, J. and I held that there was no acknowledgment of a subsisting liability there. I adhere to that opinion. But in this case, as I have already pointed out, the circumstances are perfectly clear to show that, when Narayana Iyer made his statement in paragraph 1 of the written statement, he really meant to say not only that there was a mortgage created in 1894 but also that that mortgage was subsisting on the date of the written statement. That being so, I think it complies with the requirements of law contained in S. 19 of the Limitation Act. One other case cited to us is *Subbarama Aiyar* v. *Veerabhadra Pillai* (3). In that case and also in the case decided by Miller, J., there were circumstances from which the inference was drawn in those cases that the acknowledgments were of subsisting debts.

I shall now deal with the other acknowledgment pleaded. In order to show that the acknowledgment in the written state-

3. (1921) 41 M L J 217.

The Official Assignee of Madras. v. Subramania Aiyar.

Krishnan, J.

ment is effective in saving limitation the plaintiff has to show that it was made at a time when the mortgage debt was subsisting and for that purpose he has to rely on another acknowledgment because the second acknowledgment was made more than 12 years from the date of the mortgage itself. The first acknowledgment is in Ex. IV. I have already stated its character, and there can be no doubt whatever that that acknowledgment refers to this mortgage debt. It is said by the learned Counsel for the Official Assignee before us that there was no other mortgage encumbrance which Narayani Ammal had created on any part of her property ; and the amount of the mortgage encumbrance mentioned in Ex. IV is certainly over the amount of the suit mortgage and probably represents the amount then due, of principal Rs. 1,000 and interest thereon ; possibly some interest had been paid off. Had the other side objected to our identifying this mortgage encumbrance as the plaint mortage one it would have been necessary to allow the plaintiff to adduce evidence to prove the identity of the two as he could be allowed to do under S. 19, explanation 1 of the Limitation Act ; but apparently the point was not pressed in the lower Court and therefore I agree with the learned Chief Justice that it is not necessary to send the case down to have the matter cleared up.

In the view I take the plaintiff's suit must be held to be in time, and there being no other defence of any importance or value in the case and as the parties are not in dispute with regard to the amount of the mortgage, I agree with the learned Chief Justice that we should give a mortgage decree for the amount due with costs in both Courts.

C. A. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE HUGHES.

Sri Rajah Dantuluri Devi Prasada Satyanarayana Veerabhadra Venkata Lakshmikantaraju Garu *Appellant** (*Plaintiff*).

v.

Sri Rajah Dantuluri Peda Venkata Jagannatha Raju Garu and others *Respondents* (*Defendants*).

Venkata Lakshmikantaraju garu v Peda Venkata Jagannatha Raju Garu.

Civil Procedure Code, O. 32, R. 4 (4)—Appointment of a Court guardian—Father unwilling to act—Existence of other guardians, not known to the plaintiff—Decree, whether bad for non-representation of the minor—Mortgage—Item of property within registration district, not belonging to the mortgagor—Whether mortgage not properly registered—Fraud on the registration law.

Where a Clerk of the Court is appointed as a Court guardian of a minor defendant after his father's expression of unwillingness to act as guardian, on an affidavit to the effect that there were no other principal guardians for the minor defendant, a decree obtained against the minor is not bad on the ground of his non-representation, if it is not shown that the plaintiff procured the appointment of the Court guardian being aware of the existence of other proper guardians on a false affidavit or by reason of collusion between the Court Clerk and the plaintiff.

The fact that the item of property within the jurisdiction of a registration district where a document of a mortgage was registered did not belong to the mortgagor would not invalidate the registration of the mortgage as a fraud on the registration law, unless it is shown that the mortgagor and the mortgagee colluded to insert the item in the mortgage deed with the knowledge that the mortgagor had no title to it.

Second appeal against the decree of the District Court of Godavery in A. S. No. 1 of 1918, preferred against the decree of the Court of the Temporary Subordinate Judge of Rajahmundry in O. S. No. 11 of 1916.

S. Srinivasa Aiyangar, C. V Ananthakrishna Aiyar, V Narasimhachariar and *K. Venkatarazu* for appellant.

A. Krishnaswami Aiyar and *K. Ramamurthi* for 5th respondent.

T Ramachandra Rao for 7th and 10th respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS :—*Odgers, J.* :—This is a suit arising out of a mortgage effected on the 15th April 1896 on the Gundepalli Estate. The suit on the mortgage itself was numbered as O. S. No. 25 of 1910, and will be referred to in this judgment by

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*S A No. 2031 of 1920. 1st August, 1923.

Venkata Lakshmikantaraju Garu *v.* Peda Venkata Jagannatha Raju Garu.

Odyers, J.

that designation. We are also concerned with a later mortgage but an earlier suit (O. S. No. 21 of 1910) relating to the same property. The plaintiff in this suit and the defendants 1, 2 and 3 belong to the same family *i. e.*, the family originally owning the Gundepalli estate. 5th defendant is the decree-holder both in O. S. No. 25 of 1910 and O. S. 21 of 1910. 6th defendant is alleged to be the stranger auction-purchaser of the mortgaged property in O. S. No. 25 of 1910. So, as matters stand at present, as to 25 of 1910, 6th defendant is the purchaser from the decree-holder, 5th defendant ; in O. S. No. 21 of 1910 5th defendant has obtained a decree but the properties remained unsold. The suit from which this appeal arises is O. S. No. 11 of 1916 in the Temporary Subordinate Judge's Court of Rajahmundry in which the plaintiff, the son of the 1st defendant, claims a declaration that the auction sale of the Gundepalli estate in O. S. No. 25 of 1910 and all execution proceedings relating thereto are null and void as against him and also to declare the decrees in O. S. Nos. 21 of 1910 and 24 of 1910 (we are not concerned in this appeal with the latter) are not valid and binding against him and his share. As originally framed the suit was based for the most part on immoral consideration for the mortgages. This was found against in both the lower courts and has now been given up before us.

Three points are urged in Second Appeal

(1.) That the plaintiff who was a minor in 1910 was not properly represented in O. S. No. 25 of 1910

(2.) That the guardian *ad litem* was guilty of negligence in that the following valid defences were not set up on behalf of the minor

(*a*) That the mortgage was not valid as not having been legally registered ;

(*b*) That the Court had no jurisdiction under the circumstances to pass the mortgage decree ;

(3.) That an amendment should have been allowed to repudiate the 6th defendant's plea that he is a *bona fide* purchaser for value without notice.

(1) The point of representation in O. S. No. 25 of 1910 The plaintiff who was in that suit the 3rd defendant was at first sued along with his father and guardian the 1st de-

Venkata Lakshmikantaraju garu v. Peda Venkata Jagannatha Raju garu

Odgers, J.

fendant. The father was apparently unwilling to act, and the Court clerk C. Gopala Rao, was appointed guardian on the 21st February 1911. He was appointed on an affidavit sworn by one Sangavarapu Venkataratnam who said he had been conducting the suits and all other affairs of the plaintiff as his "Tanedar" or Manager "I believe there are no other principal guardians for the said minor defendant." It is, therefore, necessary that the appeal Clerk of this Court, Mr. C. Gopala Rao should be appointed guardian of the said minor 3rd defendant.' The appeal Clerk was appointed as stated. The guardian on 30—11—1911 filed a Memorandum asking that it should be recorded that he had no instructions whatever on behalf of the minor 3rd defendant. However, on the 25th November 1911 the guardian put the plaintiff to proof of the claim. The Vakils for defendants 1, 2 and 4 said that they had no instructtions. 5th defendant was absent and the result was a decree for plaintiff for Rs. 82,000 odd with costs. It is contended on this state of things that the affidavit of Venkataratnam was clearly false as the minor was living with his uncle at the time and also had a mother alive. Reliance is placed on the deposition of D. W. 2 in the suit. His name is Kapilavaya Padmanabha Swami. He says he was managing 5th defendant's affairs, that he had known the uncle of the minor for some time and the father of the minor for 25 years and knew the existence of the plaintiff's mother. The point to be borne in mind is that this witness, D. W. 2 is a different person from the Tanedar who swore the affidavit that no other principal guardian was available. In the guardian's evidence as D. W. 2 in the O. S. he states that the father refused to be guardian and did not appear in response to notice. He did not try to get any information from anybody else, but sent a notice to the father, but it was not served. He did not apply for copies of the documents, etc., as he was not put in funds by anybody. It is pointed out that under R. 118 of the Civil Rules of Practice, the Court might have ordered the plaintiff to provide funds for the guardian to carry on the defence of the minor. This however was not done. Reliance is placed on *Ramanunni Kurup* v. *Raman Somayajipad* (1) where the affidavit filed stated that besides the second defendant the plaintiff had no next of kin. The statement was false as there was at least one person known to

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32 M L T 107 at 111.

Venkata Lakshmikantaraju Garu v. Peda Venkata Jagannatha Raju Garu

Odgers, J.

the 1st defendant and his brother who was the plaintiff's next of kin. Yet this information was suppressed. I find it extremely difficult to say that because P. W. 2 knew the mother and the uncle of the present plaintiff it must be held that the plaintiff in O. S. No. 25 of 1910 and his Tanedar who swore the affidavit must have had the same knowledge. It is nowhere alleged that either of these persons had such knowledge, and I am quite unable to see how under these circumstances it can be said to have been proved that the affidavit of Venkataratnam must have been false to his knowledge. It may here be pointed out that it is not as if the appointment of a Court guardian was *prima facie* illegal. Order 32, R. 4 (4) authorises the Court to appoint any of its officers as guardian where there is no other person fit and willing to act as guardian for the suit. Neither the mother nor the uncle came forward on behalf of the minor and it is to my mind impossible to say that either the plaintiff in O. S. 25 of 1910 or the Court had reason to believe that there was any other person fit and willing to act. In *Nachiappa Chetty* v. *Chinniah Amabalam* (2), Mr. Justice Srinivasa Aiyangar sitting alone, laid down that in the case of a contemplated appointment of a Court guardian notice must always go to the natural guardian (as it did in this case according to P. W .2) or the person with whom he lives. It is not brought to our notice that the Court guardian knew that the minor was in 1910 living with his uncle. Another case relied on is *Bhagwan Dayal* v. *Param Sukh Das* (3), which to my mind is a much stronger case than this because the uncle who was originally named as a *guardian ad litem* in refusing to act said that the minors lived with their mother. No notice was served upon the mother and a Court guardian was appointed. The judgment seems to have relied largely on the fact that there was a decree without notice to the minors. This, as pointed out is not now necessary. [See *Ramaswami Chetti* v. *Doraiswami* (4)]. As pointed out there, the absence of notice to the father of the appointment of the Head Clerk was only an irregularity which would not affect the validity of the proceedings in the absence of fraud or gross negligence on the part of the person appointed. (See page 302). The case cited in *Rashid-un-nissa* v. *Muhammad Ismail Khan* (5) was a case where minors were held not to have been represented at all,

2. (1916) 4 L W 362. 3. (1915) I L R 37 A 179.
4. (1923) 44 M L J 299. 5. (1909) I L R 31 A 572 19 M L J 631 (P C).

Venkata Lakshmikantaraju Garu v. Peda Venkata Jagannatha Raju Garu

Odgers, J.

one being represented by a married woman, which was illegal and the other being represented by a person whose interest was manifestly adverse to that of the minor. In *Maruthamalai* v. *Palani* (6), the plaintiff asked that the father should be appointed *guardian ad litem*. He refused. The Head Clerk was thereupon appointed. The fraud charged was that the plaintiff knew very well that the minor was living with his mother under the protection of his maternal grandfather and the latter ought to have been appointed guardian. The learned Judges held that the statement in the affidavit amounted to no more than that in the view of the deponent there was no fit and proper person to be appointed. They point out that the Court may have been under the duty of making further enquiry before acting on the affidavit, but that the appointment was the result of a judicial order based on evidence which the Court considered sufficient. It was not alleged that there was any collusion between the Head Clerk and the plaintiff in pursuance of which the latter applied for the appointment of that officer as guardian. Nor is there any proof of any such collusion here. In *Ramaswami Chetti* v. *Perumal* (4), the case already referred to, it was held that the plaintiff was not bound to make exhaustive enquiries. The learned Judges say at page 301 " Putting a reasonable construction on the rule we are not prepared to say that the plaintiff in this case failed in his duty, especially as there is nothing (so far as we have been shown) regarding the uncle of the minors, his residence, the plaintiff's knowledge of his existence, his interest in the minors' affairs or what is more important regarding any subsequent attempt by him to protect their interest. " In *Walian* v. *Banke Behari Pershad Singh* (7), their Lordships held that although there was no formal order appointing a guardian *ad litem* and no notice to the mother who was so appointed or to an adult male member of their family, these facts were nothing but irregularities which did not affect the validity of the proceedings. On this state of the authorities I am of opinion that the appellant has not succeeded in making out a case of non-representation in Suit No. 25 of 1910. Assuming that the same state of things prevailed in Suit No. 21 of 1910, as to which I am not quite certain for reasons to be stated later on, the same argument applies there also.

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6. (1912) I L R 37 M 535. 4. (1923) 44 M L J 299.

7. (1903) I L R 30 C 1021 L R 30 I A 182 (P. C.).

Venkata Lakshmi-kantaraju Garu v. Peda Venkata Jagannatha Raju Garu

Odgers, J.

Point 2 :—The case relied on with regard to the negligence of the guardian generally in this case is *Punnayyah* v. *Viranna* (8), where it was held that it was gross negligence not to defend the suit if there was a valid defence available. In that case the mortgage was by a guardian of the immoveable property of a minor for the purpose of lending money to another for carrying on a trade not ancestral on behalf of the minor. It was held that the guardian *ad litem* ought to have resisted the suit brought on the transaction on the ground that it was not for the minor's benefit. Ought the guardian *ad litem* to have set up either of the suggested defences in this case ; and could he have hoped to succeed if he had done so ? To consider the point of registration first

The mortgage, Ex. IX, comprises the whole of the estate or Gundepalli in the sub-district of Yernagudem, Yernagudem Taluq, Godavari District to which is added one acre of wet land on the eastern side in Jiroyiti No. 458 in the village of Katrenikona in the Sub-district of Mummudivarem, Godavari District. The mortgage was registered in the Sub-District of Mummidivaram in which the one acre was situated. It is alleged that this latter was included in the mortgage for the very purpose of its being registrable in this Sub-Registry and this is very likely the fact. It turns out that the mortgagor though he owns something like 300 acres in Katrenikona does not own No. 458 and never did. It is therefore said that the whole mortgage is invalid as the mortgagor had no title to this Mummidivaram one acre of land. The allegation contained in para. 12 of the plaint is that the mortgagor had no interest in the said one acre, which was known to all the parties to the mortgage at the time of the registration to which the defendants 6 to 10 reply in paragraph 13 of their written statement that the one acre belongs to the mortgagors and that it was intended to be mortgaged and was not illegally included. For this part of the case, the appellant relies on *Harendra Lal Roy* v. *Haridasi Debi* (9). That was a well known case of an attempt to mortgage a property absolutely non-existent, there being no such house as 25, Guru Das Street. Their Lordships held that " that parcel was in fact a fictitious entry and represented no property that the mortgagor possessed or intended to mortgage, or that the mortgagee intended to form part of his security. " In this case the evidence is that the mortgagor himself

8. (1922) I L R 45 M 425 : 42 M L J 429.
9. (1914) I L R 41 C 972 27 M L J 80 (P C).

Venkata Lakshmikantaraju Garu v. Peda Venkata Jagannatha Raju Garu

Odgers, J.

verbally mentioned this one acre when the mortgage deed was being drawn up and that as a matter of fact it is a mistake for 548 which admittedly belongs to the family of the defendants 1 and 2 in Suit No. 25 of 1910. The cases on this subject show that in order to nullify a registration on this ground the parties must have colluded. If the cases support this view as I shall show presently, it must be said that there is no evidence whatever to show that the mortgagee knew that the mortgagor possessed no such land as No. 458. *Pahladi Lal* v. *Musammat Laraiti* (10) lays down, following the Privy Council case in *Harendra Lal Roy* v. *Haridasi Debi* (9) "It is really a question of fact whether the parties have intentionally by a mutual collusive arrangement inserted in the deed property which either does not in fact exist or which while in existence is not intended by either of the parties to the suit to be a part of the security." A Bench of the Patna High Court in *Ramedi* v. *Chunder Bali Bibi* (11), have come to a similar conclusion "If there is no collusion, the circumstances are not sufficient to invalidate registration." In a recent case in *Biswanatha Prasad* v. *Chandra Narayan Chowdhury* (12), the defendant asserted that the statement in the bond that it comprised a certain share in property was to the knowledge of both parties, a mere fiction introduced for the purpose of getting registration in the Mozufferpore District. There it was held that "none of the parties ever intended that the share should vest in Udit, or pass by the mortgage from him to the mortgagee. This case differs *toto coelo* from the case suggested in argument of a mere failure to make a good title to property dealt with by the instrument, and which both parties had intended should form part of the security." It appears to me that in the absence of evidence of participation by the mortgagee either as regards the insertion of the item in the deed or of intention that the one acre should not form part of the security this point must be decided against the appellant. It was contended that the ground of mistake was not open to the defendant here as the only plea raised by the pleadings was with regard to title. It does not matter whether No. 458 was in fact a mistake for No. 548, since, as pointed out above, unless it can be proved that the mortgagee was a party to the fraud (putting it at the highest) it cannot affect the validity of the registration. It

10. (1918) I L R 41 A 22. 11. (1917) 44 I C 399.
9. (1914) I L R 41 C 972 : 27 M L J 80 (P. C.)
12. (1921) I L R 48 C 509 : 48 I A 127 : 63 I C 770 (P C).

is therefore clear that with regard to registration no valid defence was open to the Court guardian which he could have set up in favour of the minor.

(*b*) It was faintly argued that there was no jurisdiction in the Sub-Court to pass the decree or order for sale, as Ex. IX was not validly registered, and that the Court that had territorial jurisdiction over the Gundepalli Estate was the Ellore Sub-Court and not the Godavari District Court. This can be shortly disposed of by reference to S. 21 of the Civil Procedure Code which shows that it is too late to take this objection in Second Appeal.

Point 3. When the appeal first came before the District Judge, Mr. Fernandez, that learned Judge remitted certain issues to the lower Court for findings and " such other issues as the Court may deem it necessary to frame after hearing the parties again. " We are only concerned with the first, which was settled before the vacation, *viz.*, " Whether the 6th defendant is a stranger *bona fide* purchaser for value of the Gundepalli Estate in execution of the decree in O. S. No. 25 of 1910 on the file of this Court and such purchase of his is valid against the plaintiff in spite of any defects of the kind alleged attaching to the suit and execution proceedings which culminated in that purchase ? " The vacation then supervened and when the appeal came on for hearing again after the re-opening of the Court this issue was modified after hearing Counsel on both sides as follows :—" In spite of any defects of the kind alleged in the plaint as attaching to the suit in which that decree was passed. " There is thus a distinct omission in the new issue as finally settled to be remitted to the lower Court *of any defects attaching in execution proceedings.* The appellant wishes us to revise that amended issue and restore the issue as originally framed as he disires to be heard to say that it was only in execution proceedings when Ex. XX was produced (*i. e.* the sale certificate under O. 21, R. 94, C. P. C.) that he learnt that he was described therein as being still a minor and still represented by the Court guardian. The Sub-Court on the amended issue went into the various grounds which were alleged against the *bona fides* of the purchase of the 6th defendant and found that the 6th defendant was a stranger purchaser for value but that he was not a *bona fide* purchaser, in that he was either aware or presumed to have been aware that the plaintiff was a major at the auction though not by reason

Venkata Lakshmikantraju Garu v. Peda Venkata Jagannatha Raju Garu.

Odgers, J

of his knowledge of defects in the decree itself. As the learned Judge, Mr. Thiyagaraja Aiyar, justly observes "the lower Court was wrong in having gone into this question as the lower Court after hearing both sides clearly intended to limit the enquiry to the defects of the kind alleged in the plaint and not to extend it to an irregularity in the execution proceedings of which there is absolutely no allegation in the plaint." I entirely agree with his view. Mr. N. S. Narasimhachari who argued this part of the appeal frankly admitted that what he was asking for was really an amendment of the plaint at this stage. In this view it is not necessary and in fact it is impossible to come to any conclusion as to whether the plaintiff who became a major in 1913, the sale being in 1915, was not actually aware of what was going on. The matter was carefully gone into by Mr. Fernandez, and the question of defects in execution proceedings was expressly eliminated by him after hearing both sides. Speaking for myself I am entirely opposed to reopen this question in Second Appeal by allowing the appellant to amend the plaint in a suit of 1916. I would therefore find the third point also against the appellant.

I have assumed throughout, as stated above, that the suit 21 of 1910 is governed by the same consideration as 25 of 1910. As Mr. A. Krishnaswami Iyer for the 5th respondent (5th defendant) points out with regard to the mortgage involved in the former suit the question of the invalidity of the registration does not arise, so that no defence was available as to this. He contends that according to the plaint only immoral debts incurred by the 1st defendant is pleaded and this has gone. This is not perfectly clear although I am disposed to think that the learned Vakil's view is right. But if in 21 of 1910 the question of representation is involved, then in my view it stands in exactly the same position as the question dealt with above with regard to 25 of 1910.

In my view the Second Appeal fails and must be dismissed with costs, two sets (5th respondent one set and 7th and 10th respondents one set).

On the point of partition of the other properties not subject to these alienations which was raised by Mr. Anantakrishna Iyer alone, I agree with the order proposed by my learned brother.

Hughes, J.

Hughes, J.:—The suit was for partition and incidentally for declaration of invalidity of the decrees in O. S. Nos. 25 of

1910, 24 of 1910, and 21 of 1910, on the file of the District Court of Godavari. In this appeal we are not concerned with the decree in O. S. No. 24 of 1910.

Venkata Lakshmi-kantaraju Garu *v.* Peda Venkata Jagannatha Raju Garu.

Hughes, J.

In the plaint, it is not alleged that plaintiff was not properly represented in O. S. No. 21 of 1910 and it has been suggested on behalf of the respondents that the reason is that the defence as to defective registration was not available in that suit. However that may be, I am satisfied that the plaintiff was properly represented in both the suits. The contention is that the Court guardian was appointed by reason of a false affidavit and further that there was gross negligence on his part because he did not in O. S. No. 25 of 1910 set up the defence that the mortgage deed was invalid on account of defective registration. I do not think it can be said that there was a false affidavit. It was stated therein " I believe there are no other principal guardians for the same minor defendant. " It is not clear what exactly is meant by "principal guardians" but very likely it means nothing more than " fit and proper guardians " The minor was living at the time with his uncle and there was also his mother. But the mother and uncle made no attempt to intervene at any time on the minor's behalf and never showed any interest. There is no allegation of collusion between the plaintiff and the Court guardian. The facts of the case are similar to those in *Maruthamalai* v. *Palani* (4), where the propriety of the appointment of the Court officer as guardian-ad-litem was upheld. The case in *Ramanunni Kurup* v. *Raman Somayajipad* (5), (relied on by the appellant) was a case in which there was a deliberate mis-statement of fact in the affidavit.

The plaintiff therefore was properly represented in both suits O. S. Nos. 25 of 1910, and 21 of 1910. With regard to the suit O. S. No. 25 of 1910, it has to be considered whether there was a valid defence for the minor and the guardian was therefore guilty of gross negligence in not raising it. My learned brother has dealt with this point in full and I agree with him. The finding of the District Judge is that there was no collusion between the mortgagee and the mortgagors and there was no intention on the part of the mortgagee to include a land not belonging to the mortgagors. This being so, the registration is not vitiated. This defence was not open to the minor and there was no negligence on the part of the Court guardian.

4. (1912) I L R 37 M 535. 5. (1923) 32 M L T 107.

Venkata Lakshmi-kantaraju Garu v. Peda Venkata Jagannatha Raju Garu

Hughes, J.

The decrees in question are binding on the plaintiff. It is however contended that the plaintiff became a major while execution proceedings were in progress but was still treated as a minor, and therefore the purchase by 6th defendant is invalid, This is a contention not raised in the plaint and cannot be entertained now. I should mention that this point was only raised by way of answer to the 6th defendant's contention that he was any how a *bona fide* purchaser. That question does not arise in view of our finding that the decrees are not liable to be set aside.

I agree that so far as the main contentions of the appeal are concerned the appeal must be dismissed with costs. It is however contended that in any event decree for partition must be passed with regard to properties that have not been alienated. With regard to this I find that the Subordinate Judge in para. 30 of his judgment states " no decree can be passed as the plaint has not been properly stamped, and there is no evidence to show what the stamp required is. It is not known which properties have been sold and what properties have not been sold. The plaintiff cannot get a decree. The suit is dismissed." In the ground of appeal to the District Court this point was taken ; but I cannot find that the District Judge has anywhere dealt with it except that in the original judgment framing issues and calling for finding it is stated in para. 3 that the contesting respondents did not press the objection that the Court fee paid was insufficient ; and finally in para. 28 of the judgment of Mr. Thiyagaraja Iyer, it is stated that " no other question was urged at the hearing of the appeal." It is probable that he meant that no other question relating to the substantial contested matters was urged. In fact the prayer in the plaint for partition seems to have been lost sight of by everybody, There appears to be no contest so far as the partition of properties not alienated is concerned ; and no objection has been raised before us. I would therefore send back the suit to the Original Court with instructions to take it on file again and after the enquiry to decide the claim in para. 21 clause 3 of the plaint so far as it relates to the partition of properties other than those that have been alienated. The appeal as against the contesting respondents must be dismissed with costs. I agree with the order of my learned brother as to costs.

C. A. S. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD DUNEDIN, LORD ATKINSON, LORD SHAW, LORD PHILLIMORE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(On appeal from the High Court of Judicature at Allahabad).

Raja Bahadur Raja Brij Narain Rai ... *Appellant**.

v.

Mangla Prasad Rai and others ... *Respondents.*

P. C.

Raja Brij Narain Rai *v.* Mangla Prasad Rai.

Hindu Law—Joint family—Father—Debts of—Son's pious obligation in respect of—Enforceability during father's lifetime—Mortgage of ancestral and joint property by father—Validity against son—Conditions—Antecedent debt—Meaning Mortgage to discharge prior mortgages not shown to be for necessity or for discharge of antecedent debt—Validity against son—Stare decisis—*Principle of—Applicability—Plea not taken in number of cases argued by eminent counsel—Inference from.*

(1) The managing co-parcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity ;

(2) If he is the father and the reversionaries are the sons, he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt ;

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest ;

(4) Antecedent debt means antecedent in fact as well as in time, that is to say, that the debt must be truly independent and not part of the transaction impeached ;

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate is alive or dead.

The mortgagee under a mortgage of ancestral and joint property granted by a Hindu father, who was at that time the manager of the joint family consisting of himself and his two minor sons, sued upon the mortgage and obtained a decree *ex parte* against the father and the minor sons. The mother of the minors thereupon instituted a suit against the father and the mortgagee-decree-holder for a declaration that the mortgage was not binding upon the minors, and that the *ex parte* decree was so far as they were concerned null and void. It was found that the *ex parte* decree was not binding on the minors, as they were not properly represented, but that the entire amount advanced under the mortgage was applied to the discharge of two prior mortgages granted on the same property by the father. The High Court, nevertheless, decreed the sons' suit, because they found it impossible to say for what precise purpose the money raised by the two earlier mortgages had been used, or that the debt then incurred has incurred wholly irrespective of the family property.

Held, applying the propositions laid down above as the result of the authorities, and reversing the decision of the High Court, that the mortgage on foot

P. C.

Raja Brij Narain Rai v. Mangla Prasad Rai.

of which the *ex parte* decree was obtained, was raised in order to pay an antecedent debt, namely, the two older mortgages and consequntly bound the estate.

Peda Venkanna v. *Srinivasa Dikshitalu*, 4» Mad. 136 33 M L J 519; *Arumugam Chetty* v. *Muthu Goundan*, 42 Mad. 711 37 M L J 166 (F B) approved. *Sahu Ram Chandra* v. *Bhup Singh*, 44 I A 127 33 M L J 14 cons.

In such a matter it is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions.

It is true that the point was not actually taken so far as appears in any of these cases but when a long series of cases extending over a long period of time when the parties were reprsented by eminent counsel, are decided in a way where, if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad.

On appeal from the judgment and decree of the Allahabad High Court (*Tudball and Rafiq JJ.*) dated 28th Oct. 1918 from a decree of the Subordinate Judge of Ghasipur.

The material portion of the Judgment of the High Court runs as follows :—

In view of the law laid down by their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (1), *prima facie* the mortgage which is now in dispute was not executed for the payment of antecedent debts. In their Judgment their Lordships remarked as follows :—

" In their Lordships' opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or changed in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate. The exception being allowed, as in the estate of the authorities it must be, it appears to their Lordships to apply, *and to apply only*, to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him, but are joint family property."

In the present case the present mortgage was created in order to pay off two prior mortgages, that is debts which had been incurred *prima facie* on the security of the joint family property. If the facts remain at this and go no further, we shall be constrained to hold, in view of the decision of their

1. (1917) I. L. R. 39 A. 437, 447.

P. C.

Raja Brij Narain Rai v. Mangla Prasad Rai.

Lordships mentioned above, that the present mortgage was not created to pay off antecedent debts and we shall have to dismiss this appeal without any further consideration. It is urged however that the two prior mortgages may well have been mortgages which were binding upon the estate in that they had been created for antecedent debts within the definition thereof given by their Lordships and quoted above. It is urged that if these mortgages were good mortgages binding upon the estate, then the present mortgage will also be equally good as it merely replaces those two. In other words, that the present mortgagee would be entitled to take his stand upon the mortgages of 1905 and 1907 and to recover whatever was legally due from the estate. It is further pointed out that under the law as it was understood previous to the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), the present mortgage would be held to be a good one and binding upon the estate ; that the present mortgagee was a person who had no connection in any way with the former mortgages ; that he advanced his money in good faith after due enquiry as to the existence of the prior debts and taking the law as it was understood previously, he was justified in advancing his money on the security of the property. We think that there is considerable force in this argument and that in view of the fact that the present case was decided by the Court below some two years or so prior to the decision in *Sahu Ram Chandra* v. *Bhup Singh* (1), we ought to allow the plaintiff an opportunity of establishing the fact that the two prior mortgages of 1905 and 1907 were binding upon the estate, in that they were executed for antecedent debts of the father. It must be clearly understood that the words " antecedent debts " must be read within the clear meaning of the ruling in *Sahu Ram Chandra* v. *Bhup Singh* (1). It would be for the present appellant to show and prove that the debts incurred under those mortgages were incurred to discharge not only obligations antecedently incurred, wholly irrespective of the ownership of the joint family property. In other words that they were personal debts incurred by the father for his own purpose and apart from the security of the joint family property. It will be open to the plaintiffs in the present case to establish the fact that these antecedent debts were incurred for immoral purposes or for purposes which would make them not binding upon them. For this purpose we therefore remand the case to the Court below to take

1. (1917) I. L. R. 39 A. 437, 447 (P. C.)

P. C.

Raja Brij Narain Rai v. Mangla Prasad Rai

any further evidence adduced by the parties on this point. The additional evidence recorded by the Court below with its opinion thereon will be submitted to this Court.

De Gruyther K. C. and *B. Dube* for appellant.

W. Wallach amicus curiae.

1923. Nov., 14. The Judgment of their Lordships was delivered by

Lord Dunedin

LORD DUNEDIN :—The facts in this case may be very shortly stated. On the 4th March, 1908, Sita Ram granted a mortgage for Rs. 11,000 in favour of Raja Narain Brij Rai and Jagdish Narain Rai. The mortgage was secured on ancestral and joint property of which Sita Ram was at that time manager, the other members of the joint family being his two sons, minors. In 1912 the mortgagees brought a suit on the mortgage and obtained a decree *ex parte*. In 1913 the present suit was raised by the mother on behalf of her two minor sons (the elder has since become major) to have it declared that the mortgage was not binding on them and that the decree granted was so far as they were concerned null and void.

The mortgage in suit bears to have been executed in order to pay off two prior mortgages on the same property of date the 12th December, 1905, and the 19th June, 1907, respectively.

In the suit the plaintiffs cited the two mortgagees and their father Sita Ram, who had granted the mortgage. Sita Ram did not appear to defend. Jagdish Narain Rai made over his interest to his brother Raja Narain Brij Rai, who appeared to defend and pleaded that the mortgage in question having been granted to pay off an antecedent debt of the plaintiff's father, it was binding on the estate.

The Subordinate Judge found as facts

(1) That the property was ancestral and joint.

(2) That the money raised under the mortgage was to the extent of Rs. 10,265 employed in paying off the earlier mortgages.

(3) That the sons had not been properly represented when the *ex parte* decree of 1912 was granted.

He then found in law that the plaintiffs' sons were not bound by the decree of 1912, and he accordingly set aside the decree of 1912 so far as the sons were concerned ; he made no further declaration. The defendant appealed. The learned Appeal Judges affirmed the findings of fact of the Subordinate Judge with the variation that they found that the whole Rs. 11,000

P. C.

Raja Brij Narain Rai *v.* Mangla Prasad Rai.

Lord Dunedin.

had been employed in paying off the earlier mortgages ; but in view of what had been said by this Board in the case of *Sahu Ram Chandra* v. *Bhupsingh* (1), decided after the date of the judgment under appeal, they remitted to the Subordinate Judge to find whether the earlier mortgages were incurred to discharge obligations not only previously incurred but incurred wholly irrespective of the joint family property. The learned Subordinate Judge set out additional evidence as to the two earlier mortgages. On this evidence being taken up by the learned Judges of the Court of Appeal, they came to the conclusion that it was impossible to say for what precise purpose the money raised by the two earlier mortgages had been used, or that the debt then incurred was incurred wholly irrespective of the family property. They accordingly dismissed the appeal. Appeal was then taken to the King in Council.

The defendant admits that the *ex parte* decree is not binding on the minors in respect that they were not properly represented, but contends that there ought to have been a declaration that under the circumstances the property became bound and is liable to be taken in execution.

In the case of *Sahu Ram Chandra* v. *Bhup Singh* (1) the suit was brought upon a mortgage 27 years old for Rs. 200, and Rs. 15,000 was demanded in respect of the principal and accrued interest. It was pleaded that the Rs. 200 had been borrowed for family necessity, but this contention was negatived in fact. It was, therefore, a simple case of a debt having been constituted by way of mortgage on the family estate by the father manager and been allowed to swell to gigantic proportions, no money having been paid thereon. The creditors had put forward the universal proposition that if debt was found to incumber the estate, it was necessary for the other members of the family who wished to affirm its non-efficiency to prove that it was incurred for immoral purposes. If they failed to do so, then the incumbrance must stand without further question. This view was negatived by the High Court, and in order to allow the point to be settled leave was given to appeal to the King in Council. The appeal was heard *ex parte*. At the appeal it became clear that there was in no sense an antecedent debt. The incumbrance itself was the debt, the money being advanced as the incumbrance was granted. In the course of the judgment, however, Lord Hobhouse's opinion in *Mussumat*

1. (1917) I. L. R. 44 I. A. 127 : 39 A. 437 : 33 M. L. J. 14.

P. C.

Raja Brij Narain Rai v. Mangla Prasad Rai

Lord Dunedin

Nanomi Babusain v. *Modun Mohun* (2) was cited, and commenting on this it was said :—

"In their Lordships" opinion these expressions, which have been the subject of so much difference of legal opinion, do not give any countenance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made in order to discharge an obligation not only antecedently incurred, but incurred wholly apart from the ownership of the joint estate or the security afforded or supposed to be available by such joint estate.

The learned Judges interpreted that to mean that a mortgage *per se* could not be an antecedent debt, for a mortgage is obviously a security which is not apart from the security of the estate over which it is constituted. If, therefore, it could not be shown that an anterior mortgage had been incurred in respect of an antecedent debt unconnected with the estate, then the anterior mortgage could not be held to be debt antecedent to the subsequent mortgage, and that subsequent mortgage could not stand though its proceeds were entirely used to pay off the prior mortgage.

Before the present case came up to their Lordships, the expression used in the *case of Sahu Ram* had come before the consideration of the High Court in Madras in the case of *Vinjamampati Peda Venkanna* v. *Vedlamannati Sreenivasa Deekshatulu* (3), and again in *Armugham Chetty* v. *Muthu Koundan* (4), where the question was referred to a Full Bench. In the latter case the pleader had gone the whole length of saying that no mortgage could ever be an antecedent debt the payment of which was capable to support a new mortgage. In both cases the Madras High Court came to the conclusion that the judgment of the Board in *Sahu Ram's* case ought not to be so interpreted.

Upon this appeal when their Lordships were satisfied that there was this discrepancy of opinion between the judgments of the High Court of Allahabad in this case and that of Madras in the others, they thought it advisable to have the question argued before a Full Board, which has been done. Their Lordships have had the advantage of a very full and able argument in which many authorities have been quoted. It is to be re-

2. L R 13 I A 1. 3. (1917) I L R 41 M 136 33 M L J 519.
4. (1918) I. L. R. 42 M. 711 : 37 M. L. J. 166. (F. B.)

gretted that this case also is *ex parte,* but their Lordships are satisfied that the whole of the authorities bearing on the question have been fairly brought to their notice.

P. C

Raja Brij Narain Rai *v.* Mangla Prasad Rai,

Lord Dunedin.

It cannot be denied that the law on the subject of what binds an estate when the manager of the joint family estate is the father, and the reversionaries are the sons, is in a state which is somewhat illogical and in the absence of binding authority could not be accepted. On the one hand it is settled law that the manager as such cannot bind the estate at his own free will and without any compelling cause so as to bind the reversionaries. He can bind it for necessity, the necessity being the necessity of the family, and so far there is no difficulty in principle, though the question of whether in any particular instance there was a necessity, may like other questions of fact liable to be involved in a question of decree, be difficult to decide. But then there comes in the further doctrine that debt has been contracted by the father, and the pious obligation incumbent on the son to see his father's debts paid prevents him from asserting that the family estate, so far as his interest is concerned, is not liable to purge that debt. It may become liable by being taken in execution on the back of a decree obtained against the father, or it might become liable by being mortgaged by the father to pay the debt for which otherwise decree might be taken and execution be sought. It is more than apparent how in practice these two principles may clash, nor is this in any sense a new discovery. Nothing clearer could be said than what was said by Lord Hobhouse delivering the judgment of the Board in *Mussumat Nanomi's case* already quoted :—

" Destructive as it may be of the principle of independent coparcenary rights in the sons, the decisions have, for some time, established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditors' remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate, their Lordships think that there is now no conflict of authority. "

It is probably bootless to speculate as to how these seemingly conflicting principles were allowed to develop. On the one hand there is the general rule of the Mithakshara law that the manager cannot burden the estate for his own purposes. This is set forth at some length in the judgment in *Sahu Ram's case.* On the other hand there is the obligation of the son to discharge

P. C.
Raja Brij Narain Rai v. Mangla Prasad Rai.
Lord Dunedin.

his father's debts, based on the doctrine of pious duty, but perhaps reflecting a remanet, as suggested by Sadasiva Ayyar, J., in *Arumugam Chetty* v. *Muthu Goundan* (4), from the older laws of Manu under which the son had no interest during the father's lifetime. It is enough to say that both principles are firmly established by long trains of decision, and it certainly occurs to the view that the term "antecedent" debt represents a more or less desperate attempt to reconcile the conflicting principles. For after all, if looked at straight in the face, what position could be more anomalous than this. A father who is manager, borrows a like sum from A and B. To A he gives a mortgage on the family estate containing a personal covenant. To B he gives a simple acknowledgment of loan. B sues and gets a decree ; on this decree execution can follow and the estate can be taken. A, suing upon his mortgage, cannot recover. It seems to have been felt that if the debt for which a mortgage was given was in any proper sense antecedent, then it so to speak escaped the direct infringement of the principle that the father manager could not burden the estate except for necessity.

In such a matter as the present it is above all things necessary *stare decisis*, not to unsettle what has been settled by a long course of decisions. Their Lordships entirely agree with the views of the learned Chief Justice in the Full Bench Madras case. They think that the *case of Sahu Ram* must not be taken to decide more than what was necessary for the judgment, namely, that the incurring of the debt was there the creation of the mortgage itself and that there was there no antecedency either in time or in fact. Moreover, if proper attention is paid to the word "incurred," they think that it will be seen to be a proper interpretation of the sentence which has caused the doubts.

There are, however, some observations in *Sahu Ram's case* (1) which are not necessary for the judment but which their Lordships are bound to say that they do not think can be supported. Founding upon them the learned counsel in this case argued in the Court below that no liability of the sons, based on the pious obligation to pay a father's debt, could be made available to the creditor while the father was still alive. Here again, if the point was open, there would be much to be said in favour

4. I L R 42 M 711 at 730 : 37 M L J 166 (F B).
1. (1917) 33 M L J 14 39 A 437 (P C).

P. C.

Raja Brij Narain Rai v. Mangla Prasad Rai.

Lord Dunedin

of a position which seems consonant with common sense. But their Lordships are satisfied that a long train of authorities have settled the question. Instances of sale being permitted when the father for whose debt the sale was made was still alive may be found in the cases reported as follows :—

1 I. A. 321 ; 4 I. A. 247 ; 13 I. A. 1 15 I. A. 99 ; 16 I. A. 1 ; 17 I. A. 11 ; 44 I. A. 1.

It is true that the point was not actually taken so far as appears in any of these cases, but when a long series of cases extending over a long period of time when parties were represented by eminent counsel are decided in a way where if a plea which was evident had been taken and upheld, the decision would have been the other way, there arises an irresistible conclusion that the plea was not taken because it was felt to be bad. The plea, however, was actually taken in *Badri Prasad* v. *Madan Lal* (5), and was rejected by a Full Bench. In *Govind Krishna Gujar* v. *Sakharan Narayan* (6), Chandavarkar, J. says :—

"The law is now well established that under the Hindu law the pious obligation of a son to pay his father's debts exists whether the father is alive or dead."

The point was again taken and negatived in *Ramasami Nadan* v. *Ulaganatha Goundan* (7).

Their Lordships may sum up the propositions which they would wish to lay down as the result of these authorities as follows :—

(1) The managing coparcener of a joint undivided estate cannot alienate or burden the estate *qua* manager except for purposes of necessity ;

(2) If he is the father and the reversionaries are the sons he may, by incurring debt, so long as it is not for an immoral purpose, lay the estate open to be taken in execution proceeding upon a decree for payment of that debt.

(3) If he purports to burden the estate by mortgage, then unless that mortgage is to discharge an antecedent debt, it would not bind more than his own interest.

(4) Antecedent debt means antecedent in fact as well as in time, that it to say, that the debt must be truly independent and not part of the transaction impeached.

5. (1893) I L R 15 A 75 (79) (F B). 6. (1904) I L R 28 B 383 at 389.
7. (1898) I L R 22 M 49 (63) : 8 M L J 312 (F B).

P. C.

Raja Brij Narain Rai v Mangla Prasad Rai

Lord Dunedin.

(5) There is no rule that this result is affected by the question whether the father, who contracted the debt or burdens the estate, is alive or dead.

Applying these propositions to the present case, their Lordships consider that the present mortgage was raised in order to pay an antecedent debt, namely, the two older mortgages and consequently binds the estate.

The result will be that the appeal will be allowed and the decrees of the Courts below set aside with costs and a declaration made that the mortgage of the 4th March, 1908, affects the estate which may be brought to sale.

Their Lordships will advise His Majesty accordingly.

The respondents will pay the costs of the appeal.

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLER.

Raghavachariar and others *Appellants** (*Counter-petitioners* 12 *to* 14).

v.

Duvvuru Krishna Reddi and others *Respondents* (*Petitioners* 2 *to* 5 *and counter petitioners* 1 *and* 6 *to* 9).

Raghavachariar v. Krishna Redi

Mortgage decree—Execution—Sale of properties in particular order—Application for—Maintainability—Application to that effect refused in suit itself—Effect—Purchase of some items by A without notice—Usufructuary mortgage of other items to B with notice—Order of sale in case of.

Of several items of property comprised in a mortgage, appellant purchased items 1 to 3 without notice of the mortgage, and the other items were usufructuarily mortgaged to persons who took with notice of the prior mortgage. In execution of the decree on the prior mortgage, appellant, who was a party to the suit, applied that the other items might be sold first, and that those purchased by him might be sold only for the deficit, if any, on the sale thereof. *Held*, that the application was not liable to be dismissed on the sole ground that a similar application by him had been refused in the mortgage suit itself ; that the decree-holder could not be prejudiced by the order of selling, and that, in the circumstances of the case, the application should be granted.

Appeal against the order of the Court of the Subordinate Judge of Chittoor dated 4th August 1921 in A. S. No. 5 of 1921 preferred against the order dated 4th October 1919 of the Court of the District Munsif of Sholingur in E. P. No. 378 of 1919 in O. S. No. 190 of 1908.

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*A A A O No. 11 of 1922. 17th September, 1923.

Raghavachariar v Krishna Reddi — Sir Walter Schwabe, C. J.

S. A. Seshadri Aiyangar for appellant.

C. V Anantakrishna Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal from the order of the Subordinate Judge, Chittoor, confirming the order of the District Munsif on an application in execution of a mortgage decree. The position shortly was this : that the applicant, the present appellant, had at some time purchased from the mortgagor, without notice to the mortgagee, properties items 1 to 3 and had remained quietly in possession for some 20 years. The mortgage covered other items of property of considerable value which were after the date of the mortgage and after the date of the sale to the appellant mortgaged usufructuarily such usufructuary mortgagees taking with notice of the existing mortgage. The appellant applied that, in executing the mortgage decree, the other properties should be sold first, and that the properties which he had bought should be brought to sale actually only if there was a deficit on the sale of the other properties. This application was refused and it was refused solely upon the ground that a similar application had been refused in the mortgage suit itself. Now it appears that in the mortgage suit the present appellant was made a party and he did contend that he was entitled to have the properties marshalled in such a way that the mortgage amount might be realised, by the sale first of the properties, other than those which he was entitled to, subject to the mortgage. That contention of his was dealt with by the Munsif who heard the case in paragraph 22 of his judgment to which our attention has been called, and he holds, as I understand his judgment, first of all that by the decision of the Full Bench of this Court in *Appayya* v. *Ramayya* (1.) he was precluded from going into the matter at all, and secondly he holds by reason of that decision that the plaintiff, that is the mortgagee, would be prejudiced if he were to receive any such application. I think *Appayya* v. *Ramayya* (1) is an authority for the first proposition that it was not the right time for the point to be decided, and I think it is also an authority for the second proposition but so far as I can see, though it is not necessary for one to say so, the District Munsif on that occasion was wrong in respect of his view on the second proposition, because if the properties are brought to sale and some are sold first and the balance is

1. (1908) I L R 31 M 419 18 M L J 229 (F B).

Raghavachariar v. Krishna Reddi — Sir Walter, Schwabe C. J.

directed to be sold for any deficit that there may be, I cannot see how the plaintiff in the suit suffers any prejudice at all. However that may be, it seems that the view of the Full Bench of this Court was that it was not the right time to dispose of this question. That being so the fact that the learned District Munsif on that ground among other grounds refused the present appellant's then request for this order seems to be a wholly irrelevant consideration. In the judgment in *Appayya* v. *Ramayya* (1) it is pointed out that this point can be discussed and decided on the execution proceedings, and it is put in this way : "Under section 88 of the Transfer of Property Act, the Court may order that a portion sufficient to discharge the plaintiff's debt be sold and if a particular parcel is sufficient and, if the plaintiff cannot possibly be prejudiced by such a sale, it may be open to the Court to direct in the decree itself its sale before the other property." That is to say, that if there can be no prejudice, it is possible for the Court to direct in the decree itself this order of sale. But, in the execution of the decree for the sale of the land, one item may be sold first and, if the sale proceeds thereof are sufficient, the sale of the other items may be stopped. In *Ramaswami Chetti* v. *Madura Mill Company Ltd.,* (2) a similar point came before a Bench of this Court, and Srinivasa Iyengar, J., puts the point quite clearly when he points out that the decision of the Full Bench in *Appayya* v. *Ramayya* (1) was that the Court has a discretion to direct the sale of any particular item if that will be sufficient to pay off the mortgage debt, although in that case under S. 81 of the Transfer of Property no marshalling was allowed as between the parties before the Court. I confess myself to have my own doubts as to how far S. 81 of the Transfer of Property Act does apply but it is not necessary for me to express any opinion on that on this occasion. The only question that I have to consider is whether it is right that the order of sale of these properties should be regulated by the order of Court and that, in my judgment, must depend on whether the appellant has got a good equitable right as between himself and the mortgagor and as between himself and the other persons interested in the other mortgaged property ; and if he has a right to preference then it is the duty of the Court to give him preference taking care of course that the mortgagee is not prejudiced. As I have pointed out, the mortgagee is not

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1. (1908) I. L. R. 31 M. 419. 2. (1916) 1 M. W. N. 265.

Raghava chariar v. Krishna Reddi — Sir Walter Schwabe, C. J.

prejudiced by the order of selling. Therefore I think that the right order to be made in this case and the order which must be made is that the property be put up for sale, items 4 to 16 inclusive being sold before items 1 to 3, items 1 to 3 being sold only if there is not sufficient realised from the sale of the other items to pay the decree amount.

Our attention has been called to a recent decision of this Court in appeal against appellate order No. 46 of 1922 which reversed an order dismissing an application by a mortgagee to bring one item of the mortgaged property alone to sale, it being contended by the person claiming an interest in that item of property that the other items of mortgaged property ought to be brought to sale first. I understand that it was held by that judgment that the only occasion on which such a point could be taken was on the hearing of the suit itself. I desire to point out that it seems to me that that proposition is much too general and is contrary to the decision, in *Ram Dhun Dhur* v. *Romesh Chunder Chowdhry* (3) and the decision in *Appayya* x. *Ramayya* (1). In the former case it was held that a mortgagee should not be allowed to bring to sale one item of the mortgaged property only, and in the latter case, the Full Bench case, it was pointed out that there were cases in which it was not possible or right for the order to be made on the hearing of the suit and yet it would or might be open to take the point on the execution proceedings. From what I have already said it follows that in our view this also is a case where, although the point had been taken and decided against in the suit, it is open to be taken again on the execution proceedings. I agree with the decision in C. M. S. A. No. 46 of 1922 that the mere fact that it was sought to bring one property only to sale is no ground for dismissing the petition so asking : but it must not be taken that I agree, if it was the intention of that Court to decide, that when that petition is taken on the file it will not be open to the appellant in that case to have the point raised.

In the result this appeal must be allowed with costs.

Waller, J. :—I agree and I have nothing to add.

A. S. V. —— *Appeal allowed.*

3. (1883) I L R 9 C 406. 1. (1908) I L R 31 M 419 : 18 M L J 229 (F B)

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Cheif Justice,* AND MR. JUSTICE WALLER.

The Secretary of State for India in Council represented by the Collector of Salem and another *Appellants* in A. A. O. No. 290 of 1922 Respondents in A. A. O. No. 254 of 1922 on the file of the High Court (Defts).*

v.

Kuppuswami Chetti *Respondent in A. A. No. 200 of 1922 and Appellant in A. A. O. No. 254 of 1922 on the file of the High Court (Plaintiff).*

The Secretary of State for India v. Kuppuswami Chetti.

Land Acquisition Act, 1894—*Mortgaged property—Acquisition of—Mortgagee's rights and remedies in case of—Payment of compensation money to mortgagor—Mortgagee's remedy in case of—Suit to recover money from Crown—Maintainability—Cause of action—Costs awarded to mortgagee in suit on mortgage—Crown's liability for.*

Where property subject to a mortgage is acquired under the Land Acquisition Act, the Crown can make its award giving the compensation money to the mortgagor, the person in possession and the ostensible owner of the property, and is not bound to recognise the mortgagee as such at all. The remedy of the mortgagee in such a case is to apply under S. 18 of the Act to have the matter referred to the Civil Court. Where he fails to do so and the compensation money is paid to the mortgagor, his only remedy is to sue under S. 31 of the Act the mortgagor to whom the money was wrongly paid. He has no cause of action against, and cannot sue, either the Secretary of State or the Collector.

Costs awarded to the mortgagee in a suit brought by him on the mortgage can, in no event, be recovered from the Crown.

Appeals against the order dated 20th September 1921 of the Court of the Subordinate Judge of Salem in A. S. No. 300 of 1920 preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 628 of 1918, and petition under S. 115 of Act V of 1908 praying the High Court to revise the order dated 20th September 1921 of the Court of the Subordinate Judge of Salem in A. S. No. 300 of 1920, preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 628 of 1918.

The Government Pleader (C. V Anantakrishna Aiyar) for appellants.

K. Sankara Sastri for respondent

*A A O Nos. 200 and 254 of 1922 and C R P No. 422 of 1922. 21st September, 1923.

The Secretary of State for India v. Kuppuswami Chette.

Sir Walter Schwabe, C. J.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—In this case certain land was taken many years ago under the Land Acquisition Act and ultimately the value was fixed and compensation allowed at Rs. 270. In the course of the proceedings under the Land Acquisition Act, a mortgage by the owner of the land in favour of the present respondent came to light. The Revenue authorities who were enquiring into the matter came to the conclusion that the mortgage was a sham and not an effective transaction. When the award was made the mortgagee, who had not come in and claimed and was not taking any part in the proceedings, was disregarded and a part of the money was paid over to the mortgagor, the owner of the land. Before the whole of the money had been paid over, or rather while the Crown was in a position to get back some of the money that had been paid over, the mortgagee made his claim and ultimately, when his claim was found to be a good one, he received the balance of the compensation money which had not been irrevocably paid over to the mortgagor. He then proceeded to sue on his mortgage and after many vicissitudes he ultimately got a decree, having established his mortgage to be a good one against the mortgagor. Apparently he has been unable to execute that decree, although he had got the whole of the principal sum and interest except Rs. 8 from the balance of compensation money referred to above, and he has been out of pocket in respect of his costs in the mortgage suit, which costs no doubt he would be able as between himself and the mortgagor to add to his security. He now sues the Secretary of State and the present Land Acquisition Collector of Salem, treating the present Collector apparently as responsible for the acts of his predecessors, and he frames his plaint in general terms by stating the facts, namely, that he was a mortgagee, that the then Collector had notice of his mortgage and that notwithstanding that he had notice of his mortgage he paid the money over to the mortgagor. The Crown (in which expression I include the Secretary of State and the Collector) replies, " you have no cause of action against the Crown at all and, secondly, if you had a cause of action it has long since been barred by limitation." In my judgment, the Crown is right on its first contention, and it is, therefore, unnecessary to consider the second contention, though, as at present advised, I think that the Crown is also right on that.

The Secretary of State for India v. Kuppuswami Chetti.

Sir Walter Schwabe C. J.

The compensation money payable under the Land Acquisition Act is payable under that Act and that Act only. Any rights in respect of it are creatures of the Statute and nothing else. The Statute in creating the rights has given the remedies to be exercised in respect of those rights, and the law is quite clear that, where a new right is brought into existence and a remedy in respect of that right is given at the same time by the same Statute that remedy is exclusive of any ordinary rights. The leading authority on that point is the decision of Willes, J., in the *Wolverhampton Waterworks Co.,* v. *Hawkesford,* (1). The principles of the Land Acquisition Act seem to be that the Crown should, in the first instance, be allowed to recognise the person in possession as ostensible owner. There is nothing in the Act to show that it is to recognise the mortgagees as such at all. It can make its award giving its award to the mortgagor the ostensible owner of the property. The mortgagee can come in and, within a certain time and within certain limits, can apply to have the matter referred for the decision of the District Court. The Collector himself, if he has any doubt as to who is entitled to the money, can also refer it. Within a certain time, up to six months the time varying according as the claimant has, or has not, had notice under the Land Acquisition Act, but with the outside limit of six months, the claimant may himself institute proceedings under the Act ; so that the real owner of the property which has been acquired in this way is not left without a remedy. After the expiration of six months, it is provided by S. 31 of the Act, that he can take proceedings against the person who has received the money. So that the whole scheme of the Act is that down to a certain date before the money is paid over, if persons intervene and make a claim, their rights shall be enquired into and their rights established ; but that, after the money is paid over by the Crown to somebody else, they must take proceedings against that somebody else. Those being the only remedies given by the Act, I can find no sort of cause of action against either of the present defendants.

It was suggested that some cause of action might be framed in part for a wrong, breach of duty, or something of that sort against the Collector, but that view was not pressed possibly in view of the fact that we have not the right Collector before the Court ; and admittedly any action for tort would have

1. (1859) 6 C. B. (N. S.) 336.

The Secretary of State for India v. Kuppuswami Chetti. — Sir Walter Schwabe C. J.

long since been barred by limitation. Under these circumstances, in my judgment, the Crown is right and this appeal must be allowed, and allowed with costs throughout.

I ought to add that a great deal of this claim, in fact all except Rs. 8 being in respect of costs incurred as between the mortgagor and the mortgagee, I cannot ascertain any principle of law under which either of the defendants, even if otherwise liable, could be made liable for that.

In the result, C. M. A. No. 200 of 1923 is allowed with costs throughout.

C. M. A. No. 254 of 1922 and C. R. P. No. 422 of 1922 are dismissed, but without costs.

Waller, J. :—I agree to the order proposed.

It seems to me obvious that the plaintiff was aware of the award. He should therefore, have applied under S. 18 of the Land Acquisition Act for a reference to the Civil Court. This course he did not adopt. Failing that, he was entitled, under S. 31 of the Act, to sue the persons to whom the compensation money had been paid wrongly. This course he did adopt and obtained a decree. He now sues the Secretary of State and the present Land Acquisition Collector for the balance due on the decree *plus* the costs incurred in getting the decree. I am of the opinion that he has not been able to show that he has any cause of action against the defendants. The compensation money was properly paid to the ostensible owner of the property, as plaintiff did not appear and claim a reference to the Civil Court. After that, he was limited by the Act to a suit under S. 31, and that against the persons to whom the money was wrongly paid. He had no other remedy at all.

I agree that the appeal should be allowed with costs throughout.

C. M. A. No. 254 *of* 1922 *and C. R. P. No.* 422 *of* 1922:

I also agree to the order proposed in respect of these.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLER.

S. Tirumala Reddi — *Accused in C. C. No. 215 of 1923, on the file of the Court of the 2nd Class Magistrate of Gudiyatham.**

Tirumala Reddi *In re*

Penal Code, S. 179—Conviction under—Legality—Panchayat Court—Accused charged before—Declining to plead or to answer question put to him—Conviction for—Procedure before Panchayat courts—Madras Act II of 1920, S. 78—Rule 36 of rules framed under.

S. 179 of the Penal Code has nothing whatever to do with the conduct of accused persons in Court.

An accused who, on being charged before a Village Panchayat Court, says he will make any reply and remains silent is not liable to be prosecuted under S. 179 of the Penal Code.

Under R. 36 of the Rules framed in pursuance of S. 78 of Madras Act II of 1920, which regulates the procedure before the Panchayat Court, an accused charged before that Court is not bound to answer any question put to him at all and can, if he likes, decline to plead, and, if he declines to plead, the case goes on just the same.

Case referred for the orders of the High Court, under S. 438 of the Criminal Procedure Code, by the District Magistrate of North Arcot, Vellore in his letter, dated 14th May, 1923.

V. L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

Sir walter Schwabe, C. J.

ORDER :—*The Chief Justice* :—This is a reference by the District Magistrate of North Arcot, under S. 438 of the Code of Criminal Procedure, in relation to a conviction by the Sub-Magistrate of Gudiyatham of one Tirumala Reddi under S. 179 of the Indian Penal Code, he being fined Rs. 10, in default, seven days' simple imprisonment.

The facts appear to be that the accused had been summoned for some offence before the Village Panchayat Court at Kandiapedu, he being charged with instigation to beat. On being charged before that Court he said he would not make any reply and remained silent. The Panchayat Court thereupon sanctioned the prosecution of the accused under S. 179 of the

*Cr R C No. 355 of 1923.
(Cr R P No. 62 of 1923). 4th October, 1923.

Indian Penal Code. S. 179 runs, "Whoever, being legally bound to state the truth or any subject to any public servant refuses to answer any question demanded of him touching that subject by such public servant in the exercise of the legal powers of such public servant, shall be punished." The procedure before the Panchayat Court is governed by the Madras Act II of 1920 and the rules made in pursuance of S. 78 of that Act. The rules have been published and are to be found in Government Order No. 572 of 1922 dated the 2nd March, 1922 published in the Fort St. George Gazette. By Rule 36, "If the accused pleads not guilty or declines to plead, the Court shall proceed to examine the complainant, if any, the witnesses for the prosecution and the witnesses of the accused." Those rules made the procedure of this Bench Court precisely the same in respect of the pleading of the accused as the provisions of the Criminal Procedure Code which apply to other Courts in this country. As far as this matter is concerned, they come to this, that an accused is not bound to answer any question put to him at all and can, if he likes, decline to plead, and, if he declines to plead, the case goes on just the same. In my judgment, S. 179 of the Indian Penal Code has nothing whatever to do with the conduct of accused persons in Court. What they have to do and what they have not to do is provided by the Code of Criminal Procedure where it applies, and by the rules governing a Panchayat Court where they apply. This conviction of the accused under S. 179 of the Indian Penal Code was entirely wrong. No offence under that section had been committed. The order of conviction must therefore, be set aside and the fine, if paid, must be refunded.

Panchayat Courts have got ample powers to deal with such cases. They can simply go on with the case. Having heard the evidence if they choose to convict, their conviction will be perfectly in order, although the accused has failed to plead and although the accused by his demeanour has been contemptuous of the Court which has been trying him.

Waller, J. :—I agree to the order proposed. It is quite clear that S. 179 of the Indian Penal Code has no application to a refusal to plead to a charge.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLACE.

The Secretary to the Board of Revenue (Income-tax), Madras. *Referring Officer*.*

v.

S. R. M. A. R. Ramanathan Chettiar *Assessee.*

The Secretary to the Board of Revenue, Madras. *v* Ramanathan Chettiar.

Income Tax Act of 1918, S. 2, cls. 6 and 7—Machinery sold as not obsolete—Loss sustained by sale—Deduction from annual profits—Assessee's right to—Statute—Punctuation marks if and when part of.

An assessee, who carried on various businesses two of which consisted of rice mills, sold those mills, and wished to bring into account the difference between the purchase price of the machinery at those mills and the sale price, giving credit for the amounts, if any, allowed to him in previous years for depreciation. The Commissioner found as a fact that the machinery was sold as not obsolete. On a question referred by him whether the assessee was entitled to the deduction from the annual profits of the loss sustained by the sale, *held* that, on the true construction of S. 2, cls. (*vi*) and (*vii*) of the Income Tax Act of 1918, the assessee was not entitled to the deduction claimed.

Where a statute has been punctuated, the punctuation marks must be taken as part of the statute.

Case stated under S. 51 of the Indian Income Tax Act VII of 1918 by the Secretary to the Board of Revenue (Income Tax), Madras.

The Government Pleader (*C. V Anantakrishna Aiyar*) on behalf of the Government.

A. Krishnaswami Aiyar and *M. Subbaraya Aiyar*, for the assessee.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—The question referred for the opinion of the Court is whether the assessee is entitled to the deduction from the annual profits of what in fact is a loss made by him by the sale of certain machinery or plant. He carried on various businesses two of which consisted of rice-mills. He sold those mills and wishes to bring into account the difference between the purchase price of the machinery at those mills and the sale price, giving credit for the amounts, if any, allowed to him in previous years for depreciation. Whether he can do so or not turns on the proper interpretation of S. 9 of the Income Tax Act VII of 1918, sub-S. (2), cls. (*vi*) and (*vii*). Certain specified allowances are

*R. C. No. 5 of 1922. 28th September, 1923.

The Secretary to the Board of Revenue, Madras. *v.* Ramanathan Chettiar — Sir Walter Schwabe, C. J.

thereby made which may be taken into account in arriving at the profits of the business. While the machinery is being used, cl. (*vi*) allows a certain annual depreciation on such machinery, the practice being, we are told, to consider that the machinery has a life of 15 years, and therefore to allow an annual depreciation as a general rule of 6 1|4 per cent. Cl. (*vii*) deals with cases where the machinery has been sold or discarded as obsolete, and in that case, the assessee is entitled to deduct from his profits the difference between the original cost, reduced by the annual allowances for depreciation added together, and the amount for which the machinery is actually sold or its scrap value. It was contended in this case that the assessee who had got rid of these two mills by sale had sold them as obsolete. There was no finding of fact as to this in the original case referred to this Court and for that reason we sent it back to the Commissioner. Evidence has been taken before him and he has found as a fact that the machinery was sold as not obsolete. It appears that, so far as one of the mills is concerned, the machinery had been allowed to get into a very bad state of repair, and required the expenditure of a considerable sum to put it in proper working order. Evidence has also been given that it had been put in proper working order by the purchaser and is being used for its proper purposes, namely the milling operations. On that the Commissioner has found the fact that the machinery was not obsolete, and I cannot see how we can say that he was wrong in so finding.

It is then argued that, on the true construction of cl. (*vii*), all sales of machinery are included irrespective of whether they are sold by reason of their being obsolete : in other words, that the words " as obsolete " govern the word ' discarded ' appearing immediately before them, and not the word ' sold. ' The phraseology of this clause is not very happy because it is obvious that the words could bear either meaning but the Statute has been punctuated, and we must take the punctuation marks as part of the Statute. If it was intended to read the words " as obsolete " as governing ' discarded ' only and not as governing ' sold ' one would expect to find a comma after the word ' sold.' There is none, the comma being put after the word ' obsolete. ' Further, it does not seem probable that the legislature meant to provide a deduction for losses on such sales of machinery by manufacturing concerns, without at the same time providing for the bringing into account as profits any profits that might be made on such sales. Sales of machinery are sales of part

The Secretary to the Board of Revenue, Madras *v.* Ramanathan Chettiar. — Sir Walter Schwabe, C. J.

of the capital of a concern of this kind and the resulting profit or losses on such sales are dealt with quite apart from this section. Without this caluse at all, the Commissioner, can and does consider whether or not realised profit or realised loss on such a sale is to be brought into account or not, and the answer depends on whether the sale is in fact part of the ordinary business operations of the concern.

On these grounds I think the answer to the question referred to us is that the assessee is not entitled to the deduction claimed.

The question originally referred to us was " Is an assessee disentitled from claiming from out of his income from business an allowance under S. 9 (2) (*vii*) in respect of a rice mill machinery when the assessee has ceased to derive profits from rice mill business though he earns profits from other parts of his business ? " That question does not arise as we find that he is not entitled to an allowance under S. 9 (2) (*vii*) because the machinery was not sold or discarded as obsolete. We are told that the assessee came here originally believing that the point he had to argue was whether the fact that he ceased to derive profits from his rice mill business when he earned profits from other parts of his business prevented S. 9 (2) (*vii*) applying, and he understood from the wording of the reference that the whole case was going to proceed in this Court on the basis that he would be entitled to an allowance under S. 9 (2) (*vii*) but for the fact that he ceased to carry on the rice mill business, and that this was admitted. I think there is a good deal in what he says, and that he could not have had any idea from the terms of the reference that he was going to be called upon to argue the question whether or not the sale of his business machinery had been because that machinery had become obsolete and that therefore he was not entitled under S. 9 (2) (*vii*) in any event. In these circumstances, I think that there must be no costs of this reference.

Wallace, J. :—I agree. I have nothing to add.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Kandaswami Goundan ... *Petitioner* (Accused in C. C. No. 1083 of 1922 on the file of the Court of the 2nd Class Magistrate of Palni).*

Kandaswami Goundan In re

Penal Code, S. 353—Offence under—Revenue Inspector—Distraint for arrears of revenue by—Resistance to—Offence committed by—Warrant of distraint addressed only to village headman, his subordinate—Effect.

A Revenue Inspector, who was supervising the work of a village headman, as it was his duty to do, and who had been specially enjoined by his superior, the Tahsildar, to attend to the work of distraint, was, while distraining property of the accused for arrears of revenue, resisted by him. *Held,* that the accused thereby committed an offence under S. 353 of the Penal Code, notwithstanding that the warrant of distraint was addressed to the village headman and not to the Revenue Inspector.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate of Dindigul in Criminal Appeal No. 9 of 1923, preferred against the Judgment of the Court of the Second Class Magistrate of Palni in C. C No. 1083 of 1922.

K. S. Jayarama Aiyar for the petitioner.

V L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—I am unable to accept the suggestion that the offence committed by the accused in resisting the Revenue Inspector, who distrained property of the accused for arrears of revenue, fell short of an offence under S. 353, I. P. C. for the sole reason that the warrant of distraint was addressed to the village headman and not to the Revenue Inspector. The latter was supervising the work of the headman, as it was his duty to do, and he had been specially enjoined by his superior, the Tahsildar, to attend to the work of distraint. The cases of *Queen Empress* v. *Dalip* (1) and *Rex* v. *Roxburgh* (2) are distinguishable. In the former there was a failure to comply with the strict requirements of S. 56 of the Code of Criminal Procedure which failure made the act of the constables unauthorised, and in the latter the constable acted lawfully though not in the exercise of his duty as a police officer.

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*Cr R C No. 306 of 1923.
(Cr R P No. 229 of 1923). 10th October, 1923.

1. (1896) I L R 18 A 246.
2. 12 Cox. Cr. Cases 8.

Kandaswami Goundan In re

The conviction, therefore, is legal under S. 353, I. P. C. and in respect of the charge of insult (S. 504, I. P. C.) which was added at the trial, there is evidence to support it and no rebutting evidence.

P. W. 4 does not speak to the insult and P. W. 5 does not say what words were used though he says that the accused uttered defamatory language. Ex. A, a statement taken at the time, also corroborates it. I consider it unnecessary to call upon the joint Magistrate to find distinctly whether this charge was proved.

As regards sentence, the accused was awarded two sentences, one of three months' and one of two months' rigorous imprisonment to run concurrently.

He has already undergone 28 days' imprisonment and I consider that he has had a sufficient lesson for losing his self control and daringly resisting the officers of Government. After all the bull was attached and the Government demand was satisfied. No one was physically injured. The affair assumed a serious importance because the Revenue Inspector was flouted and the authority of the Revenue Authorities to collect the arrears of revenue was set at naught.

I reduce the sentence to the amount of imprisonment already undergone and direct that the accused be released from his bond.

A. S. V. *Conviction confirmed.*
Sentence reduced.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Mantina Ramachanda Raju and another . *Petitioners**
(*Counter-petitioners* 1 *and* 2-*defendants* 1 *and* 2).

v.

Sri Raja Mantripragoda Bhujanga Rao Bahadur Zamindar Garu *Respondent* (*Petitioner-Plaintiff*).

Ramachandra Raju v. Sri Raja Bhujanga Rao.

*Civil Procedure Code, O. 20, R. 12—Mesne profits (future) awarded by preliminary decree for possession—Application for ascertainment of—Maintainability—*Res judicata*—Prior execution petitions praying for same relief—Dismissal of, but not on merits —Effect.*

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*C R P No. 797 of 1922. 11th October, 1923.

Ramachandra Raju *v.* Sri Raja Bhujanga Rao.

A preliminary decree for possession of immoveable property awarded mesne profits subsequent to suit. On an application filed by plaintiff under O. 20 R. 12, C. P. C. for ascertainment of those profits, *held* that the same was not barred by *res judicata* by reason of the fact that plaintiff had previously filed execution petitions for ascertainment of those profits under the erroneous impression that they were to be ascertained in execution and that those petitions were dismissed either because of plaintiff's laches or because he did not press that relief.

After the passing of a preliminary decree the dismissal of an application, not on the merits, but owing to, say, non-appearance of the plaintiff or laches on his part, cannot result in the dismissal of the suit itself.

Upendra v. *Sakhi Chand,* 16 C L J 3 cons.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order of the Court of the Additional Subordinate Judge of Coconada, dated the 13th day of October, 1922, in I. A. No. 646 of 1922 in O. S. No. 23 of 1919.

C. Rama Rao for petitioners.

A. Krishnaswami Aiyar and *K. Kamanna* for respondent.

The Court delivered the following

JUDGMENT :—The preliminary decree which was for the possession of immoveable property awarded mesne profits subsequent to suit, and the plaintiff applied under O. 20, R. 12, C. P. C., for ascertainment of those profits. The learned Subordinate Judge made an order in the plaintiff's favour and the defendants have filed the Civil Revision Petition assailing this order.

The defendants object that the plaintiff was precluded from making the application in question by reason of the fact that he made previous applications in order to get the same relief and those applications were rejected. The material facts with reference to which this contention is advanced are these. The plaintiff filed an Execution Petition and he sought to execute the decree so far as it was capable of execution, but he in addition prayed for ascertainment of mesne profits under the erroneous impression that profits were to be ascertained in execution. As the Execution Petition was not accompanied by a copy of the decree, time was granted for its production and as the copy was not produced within the time granted, the petition was rejected. The plaintiff again applied in execution for ascertainment of profits and this application was not pressed and was dismissed. This was followed by another Execution Petition which again included a prayer for ascertainment of mesne profits. This relief was, however, not pressed, but the other prayer for attachment was granted, properties were

Ramachandra Raju v. Sri Raja Bhujanga Rao.

attached and proclaimed for sale. So far the plaintiff applied in execution for ascertainment of profits and there was no judicial determination of his right in respect thereto. But plaintiff apparently realising that his previous applications were misconceived filed the petition in question under O. 22, R. 12, praying for an inquiry as to mesne profits due to him, and the question to be decided is whether by reason of the dismissal of the previous applications, the present application is barred. It is not suggested that it is barred by limitation ; but the argument appears to be that the dismissal of the previous applications is tantamount to the dismissal of the suit itself, and that therefore a fresh application which is in the nature of a fresh suit cannot be maintained, the previous dismissal operating as a bar to the maintainability of the present application. First, it is to be observed that the Court had no jurisdiction to entertain what were termed Execution Applications for ascertainment of mesne profits. Secondly the Court did not purport to decide nor did it decide the plaintiff's right to recover mesne profits. The rule of *res judicata* cannot therefore obviously apply. On what ground then can the dismissal of an application operate as a bar to a fresh application ? In *Upendra* v. *Sakhi Chand* (1), in somewhat similar circumstances, it was held that the dismissal of an application for assessment of mesne profits was equivalent to the dismissal of the suit itself and that a fresh application would not lie. This case is distinguishable on the ground that the order which was sought to have the effect of *res judicata* was that " the case be dismissed for default on behalf of the plaintiff." The order in those terms was said to have been made on account of the laches of the plaintiff in that suit. We however fail to see how after the passing of a preliminary decree the dismissal of an application, not on the merits, but owing to say, non-appearance of the plaintiff or laches on his part, can result in the dismissal of the suit itself. The dismissal of the suit would involve the obliterating of the preliminary decree, that is, taking the present case and giving effect to the argument strictly, the dismissal of the application for ascertainment of mesne profits would lead to the dismissal of the suit, that is the suit which was *inter alia* for the recovery of the immoveable property although a decree had already been passed for the possession of that property. This will indeed be a startling result. The provisions

1. (1912) 16 C. L. J. 3.

Ramachandra Raju v. Sri Rajah Bhujanga Rao.

of O. IX, have no application to such cases. Take for instance O, IX, R. 3, which runs thus :—" When neither party appears when the suit is called on for hearing, the Court may make an order that the suit be dismissed." If after the passing of a preliminary decree this rule is to be applied the suit has to be dismissed and the decree already passed becomes vacated. The rule does not say that the decree shall become vacated and the obvious inference therefore is that O. IX has no application in circumstances like the present. Therefore, we have to fall back upon the general principle of *res judicata* and so long as the merits of an application have not been decided, we see no ground for disallowing a subsequent application. The petitioners also relied upon *Mammadi Venkatiah* v. *Boganatham Venkatasubbiah* (2). That was a suit upon a mortgage and no portion of the preliminary decree was executable, and on this ground it is distinguishable. But it has been argued that the principle underlying that ruling is equally applicable here. For the reasons we have given, we are not prepared, at any rate, to extend the application of the principle given effect to in that decision and, in our opinion, the Subordinate Judge has correctly decided the point, and the Civil Revision Petition is accordingly dismissed with costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR JUSTICE ODGERS.

Jeladi Burayya and others *Appellants** (*Defendants 2 to 5*).

v.

Ponduri Ramayya and another *Respondents* (*1st defendant and legal representative of plaintiff*).

Jeladi Burayya v. Ponduri Ramayya.

Hindu Law—Minor—Guardian—Debt borrowed for purchase of property for minor—Binding character of, against minor's estate or heirs—Purchase beneficial to minor—Effect—Creditor's rights in such case.

Where the guardian of a minor borrowed money for purchasing property for the minor and executed a promissory note therefor, ***held,*** in a suit on the note brought after the minor's death against his heirs, that, even assuming that the

*S A No. 724 of 1922. 26th September, 1923.

2. (1921) 42 M. L. J. 51.

Jeladi Burayya v Ponduri Ramayya

purchase was for the benefit of the minor, the debt was not binding on the minor's estate or the heirs of the minor, but that the plaintiff was entitled to a decree against the lands actually purchased with the money advanced by him.

Second appeal against the decree of the District Court of Guntur in A. S. No. 81 of 1921, presented against the decree of the Court of the Additional District Munsif of Guntur in O. S. No. 369 of 1920.

B. Somayya for appellants.

V. Ramadas and *V. Krishna Mohan* for respondents.

The Court delivered the following

JUDGMENT :—In this case defendants 2 to 5 are the appellants. They are the heirs-at-law of one minor Tirupatayya who died some time ago. The plaintiff brings this suit for recovering from the 1st defendant personally and from the minor's estate in the hands of defendants 2 to 5 the amount due under the promissory note, Ex. A, which is a renewal of Exs. A-1 and A-2. It is found by the learned District Judge that the money due under the promissory note was borrowed for the purpose of paying the purchase money for certain lands which the guardian of the minor purchased for him. The question we have to decide is whether the money so borrowed for purchasing lands—we will assume that the purchase was for the benefit of the minor—constitutes a debt really binding on the estate of the minor. There can be no doubt that there was no necessity to borrow this money at all, nor to buy the lands. The District Judge has found that there was no necessity so to borrow but he seems to have thought that, as it might be for the benefit of the minor, the minor's estate would be liable. We are unable to agree with this proposition. The guardian had no right whatever to involve the ward's estate in debt for the purpose of purchasing lands to be added to his estate. It has been so decided in this Court in several cases—*vide Subramania Nadan* v. *Ramaswami Nadan* (1) and *Subramania Chetty* v. *Chidambara Mudaly* (2). We must, therefore, hold that the debt in this case due under the promissory note sued upon is not binding on the minor's estate or the heirs of the minor, and the decree passed against the minor's estate in the hands of his heirs must be set aside. All that the plaintiff is justly entitled to is to have a decree against the lands actually purchased with the money advanced by him. There will, therefore, be a decree in favour of the plaintiff only against the lands covered by Ex. I, the purchase-money under which the

1. (1913) 25 M L J 563. 2. (1921) 41 M L J 459.

Jeladi Burayya v. Ponduri Ramayya.

promissory note amount was borrowed. The lower Court has refused a personal decree against the 1st defendant. There is no appeal against that portion of the decree and, therefore, we cannot pass any orders against the 1st defendant in this appeal.

As regards costs, the right order to pass in this case is to give defendants 2 to 5 their full costs throughout, the plaintiff paying such costs. As between the plaintiff and the 1st defendant, there will be no order as to costs in the second appeal.

A. S. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Thirumurthy Chetty *Appellant** (*Defendant*).

v.

Ponnan Chetty *alias* Karuppan Chetty *Respondent* (*2nd Plaintiff*).

Thirumurthy Chetty v. Ponnan Chetty.

Civil Procedure Code, S. 102—Small Cause Court—Suit cognisable by—Award—Money payable under—Suit to recover—Second Appeal in—Award—Suit to enforce—If suit to enforce contract.

A suit to recover money payable under an award is a suit of a small cause nature, and no second appeal lies against the decree in such a suit.

Semble : a suit to enforce an award is not the same as one to enforce a contract.

Appeal against the order of the Court of the Subordinate Judge of Dindigul dated 10th August, 1922 in A. S. No. 1 of 1922, preferred against the decree of the Court of the District Munsif of Palani in O. S. No. 285 of 1920.

T. L. Venkataramier for appellant.

S. Muthia Mudaliar for respondent.

The Court delivered the following

JUDGMENT :—This is a suit to recover money payable under an award. It is cognizable by a Court of Small Causes [*Vide Simpson* v. *McMaster* (1) and *Mizaji Lal* v. *Partab Kunwar* (2)]. No second appeal lies and therefore this Civil Miscellaneous Appeal must be dismissed with costs.

The appellant's pleader has quoted the authority of *Kunja Behary Bardhan* v. *Gost Behary Bardhan* (3). The suit there dealt with involved the partition of immoveable property and the award could not be enforced piecemeal by giving the

*A A O No. 424 of 1922. 21st August, 1923.

1. (1890) I L R 13 M 344. 2. (1919) I L R 42 A 169.

3. (1917) 22 C W N 66.

Thirumurthy Chetty v. Ponnan Chetty.

plaintiff a decree for a sum of money which was also due under the award.

There is a remark in that judgment that a suit for enforcement of an award is in essence a suit for specific performance of a contract. But a suit for the recovery of money, as this is, can in no sense be treated as a suit to enforce a contract. Moreover, the observation that a suit to enforce an award and a suit to enforce a contract are practically the same is opposed to the view taken in earlier decisions of the same Court [*Vide Sukar Hajam* v. *Oli Mohammad* (4) and *Bhajahari Saha Banila* v. *Behary Lal Basak* (5)].

We see no reason to interfere with the order of the lower Court in the exercise of our revisional powers under S. 115 of the Code of Civil Procedure. The result will be as above stated.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Vedala Venkata Subbamma, the appellant is the legal representative of the deceased 1st respondent (*vide* affidavit dated 12—2—1923). *Appellant** (*Plff.*).

v.

Vedala Venkamma (dead) and others. *Respondents* (*Defendants*).

Venkata Subbamma v. Venkamma.

*Hindu Law—Widow—Adoption by—*Factum *or validity of—Her right to dispute—Estoppel—Adoption in assertion of authority given by husband to adopt—Treatment and holding out of boy as adopted son by her—Validity disputed long after adoption on ground of absence of authority—Effect.*

First defendant, a Hindu widow, asserting that she had authority to adopt given to her by her husband, adopted plaintiff's husband in 1897. She repeated the assertion even subsequently, and by her acts and conduct, treated and held out plaintiff's husband as a lawfully adopted son, in consequence of which he severed from his natural family. In a suit brought in 1919 by plaintiff alleging that her husband was the adopted son of 1st defendant's husband, *held* that 1st defendant was estopped from disputing either the *factum* or the validity of the adoption.

The representation of the 1st defendant cannot, in the circumstances of the case, be restricted to a representation that the ceremony of adoption had taken

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*Appeal No. 201 of 1921. 5th October, 1923.

4. (1914) 25 I. C. 826. 5. (1900) I L R 33 C 881.

place, but must be treated as a representation that the ceremony was validly performed.

Dharam Kunwar v. *Balwant Singh*, I. L. R. 34 All. 398 (P. C.) followed.

Venkata Subbamma v. Venkamma.

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 68 of 1919.

T. R. Ramachandra Aiyar, T R. Krishnaswami Aiyar and S. Srinivasa Aiyar for appellant.

A. Krishnaswami Aiyar and *V. Suryanarayana* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff in this case is the widow of one Vedala Janakiramayya who is said to be the adopted son of the first defendant's husband. The first defendant has denied both the *factum* of the adoption and also its validity. The Subordinate Judge has found that the ceremony of adoption did actually take place and that the plaintiff's husband has been treated as an adopted son by the first defendant, but he has held that, the first defendant not having had authority from her husband or from the sapindas to make the adoption, the adoption is invalid ; and he has further found that the first defendant is not estopped from raising the plea of the invalidity of adoption. In appeal, the *factum* of the adoption is not disputed and the only point which is seriously argued is that the authority given by the husband has not been actually proved ; but it is contended that the first defendant, by her conduct and acts from the time of the adoption until the present day, is estopped from denying that the plaintiff's husband was really her adopted son.

There are many facts proved which we think may be referred to in detail, as the question of estoppel must depend upon the evidence and we will proceed to mention the chief circumstances which would lead to an inference in coming to a decision. In the first place, when this boy was adopted his name and his house name were changed. He took the house name of the first defendant's husband and the name of his adopted father's father. Immediately after the adoption, the first defendant performed his upanayanam ceremony. Some years later, the first defendant performed his marriage and also grahapravesam ceremony. The adopted boy performed the shraddha for the first defendant's husband and it also appears that he had no share in the property belonging to his natural family. The partition in the natural family has not been actually proved,

Venkata Subbamma v. Venkamma.

but, from the only evidence available, it seems clear that Janakiramayya did not receive any of his natural family's property. There is the further circumstance, that, when Janakiramayya's natural mother died, the plaintiff did not observe pollution and, if Janakiramayya had been a member of that family she must undoubtedly have done so. These circumstances are all very strong evidence that the first defendant did adopt the boy and treated him as a lawfully adopted son ; his performance of the ceremonies mentioned was one that could only be done by an adopted son, and, therefore, the whole course of the conduct of the first defendant and, as far as we know, of other people, showed a recognition of the validity of Janakiramayya's adoption. In this connection, we may refer to the case decided by the Privy Council in *Dharam Kunwar* v. *Balwant Singh* (1), which in many respects resembles the facts here. It is suggested in *Seshayyar* v. *Saraswathi Ammal* (2), that the remarks of the Privy Council in this case are mere *obiter dicta*, but we think that is hardly so, although they decided the question in issue in two ways once as a question of fact and again on the question of estoppel, which had been the only one decided, by the Allahabad High Court. In that Judgment we find the following passage relating to the widow who was held to be estopped from disputing the validity of the adoption which she had made. " She has asserted her authority in the most solemn manner under her hand and seal, and her conduct both before and after that assertion has been of a like unequivocal character. She could not now be allowed to change her story without grave injustice ensuing to those who have acted in reliance upon her deliberate and repeated representations. The respondent is now severed from his natural family he has undergone a change of social status which may or may not be beneficial to him, but which has certainly so altered his mode of life as to make a relapse into his former condition a grievous hardship upon him. He and his friends have been driven to expenses in the maintenance of his privileges with which the Rani purported to endow him. He married on the faith of his adoptive mother's word, and no doubt has creditors who have sold him goods or lent him money in like reliance on her good faith. " Many of these facts we find in the present case and we think that they are sufficient to constitute an estoppel. It was contended by Mr. Krishnaswami Aiyar for

1. (1912) I L R 34 A 398 : 23 M L J 200 (P. C.)
2. (1920) 12 L W 544.

the respondent that the representation by the first defendant that the boy had been adopted was nothing more than a representation that the ceremony of adoption had taken place and that it could not be treated as a representation that that ceremony was validly performed. In the circumstances of this case we are not prepared to accept that plea. It would be very difficult at this late stage to prove the auhority considering that the adoption took place as long ago as 1897 and when the first defendant by her words and acts held out the boy as her adopted son, it is difficult to restrict that representation to a mere assertion that the ceremony of adoption had taken place. In addition to her conduct we have the deliberate statement made by her in Ex. K which is the earliest opportunity afforded to her to make a representation in public, that she had her husband's authority to adopt. There is also evidence that she asserted this authority at the time of the adoption, which we see no reason to discredit. This coupled with her conduct is quite sufficient to constitute an estoppel and we must hold accordingly that she is estopped from denying the adoption.

A further question is raised by the respondents as to item 3, which the second defendant claims to have detained under some arrangement with the first defendant in 1897. The second defendant has not been examined and the first defendant does not support his case, and we have only very vague indications from the evidence to enable such a case to be put forward. It certainly has not been proved.

The appeal will be allowed and the plaintiff will have a decree for possession of the suit property and for mesne profits at the rate of Rs. 250 per annum from the date of plaint. As the first defendant is now dead, the mesne profits will be payable by the second defendant and defendants 3 to 6. The question of their respective liabilities will be determined in execution. The plaintiff will have her costs throughout against the second defendant and the second defendant will pay Government the Court fees on the plaint and the appeal memorandum.

A. S. V *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE HUGHES.

Rangaswami Aiyangar *Appellant** (*Defendant*).

v.

Veeraraghavachari—declared major *vide* Order in C. M. P. N. 2202 of 1921, dated 9—11—1921. *Respondent* (*Plaintiff*).

Rangaswami Aiyangar *v* Veeraraghavachari

Mortgage deed—Attestation —Validity —Question as to—Appeal —Maintainability for first time in —Usufructuary mortgage —Personal covenant to pay —What amounts to.

The objection that the mortgage bond sued upon has not been validly attested cannot be allowed to be taken for the first time in the appellate court as it raises a question of mixed law and fact.

A mortgage deed recited : " I have this day usufructuarily mortgaged to you one acre and five cents of land which I am enjoying and the amount which I got thereon as a loan is Rs. 1,000 You shall yourself enjoy the said land from this date in lieu of interest and having paid the amount of the principal by 7th July, 1917, having endorsed on this deed I shall enjoy the said land. If the amount be repaid at the cultivation season of any Ani month after the due date on which it falls due, the same must be received in full and the land restored to my possession."

Held that, on a true construction of the deed, there was a personal covenant on the part of the mortgagor to pay.

Second appeal against the decree of the Court of the Subordinate Judge of Kumbakonam in A. S. No. 118 of 1919 preferred against the decree of the Court of the District Munsif of Valangiman in O. S. No. 18 of 1918.

K. S. Krishnaswami Aiyangar and P. S. Ramaswami Aiyangar for appellant.

T M. Krishnaswami Aiyar for respondent.

The Court delivered the following

Hughes, J.

JUDGMENTS :—*Hughes, J.* :—The first question argued in this appeal relates to the alleged invalidity of the mortgage on the ground that it was not properly attested. This question, in my opinion, has not really been considered by the District Munsif in his judgment and he has given no decision about it He says no doubt in para. 10, " P. Ws. 1 and 2 have both attested Ex. A. Their evidence shows that they attested Ex. A. at the request of defendant and that they were not present at the time of the execution of Ex. A by the defendant. In his written statement, defendant did not put plaintiff to proof

*Second Appeal No. 286 of 1921. 31st July, 1923.

Rangaswami Aiyangar v. Veeraraghavachari

Hughes, J.

of the suit mortgage deed, Ex. A. Plaintiff appears to have put these two witnesses into the box only to prove the consideration for Ex. A. The fact that P. Ws. 1 and 2 did not see the defendant execute Ex. A. by itself does not count much for defendant. Taking the evidence and the probabilities into consideration, I come to the conclusion that defendant has miserably failed to prove his case. I therefore find the first issue against the defendant." The first issue dealt only with the question of consideration. Now the District Munsif was quite right in giving no decision as to the question of validity. The defendant did not raise this point in his written statement in the suit ; in para 6 of that statement he treated the mortgage as valid; he said nothing about its invalidity in his own evidence; the trial proceeded on the footing that the deed was a valid mortgage and on that basis the whole trial was closed. If, as is stated, the matter was referred to in the arguments before the District Munsif, no request was made that an issue should be framed. If an issue had been framed the witnesses P. Ws. 1 and 2 and the defendant might have been properly questioned about it. The evidence of P. W. 2 on the point is ambiguous and certainly requires amplification. There was another attestor who was not examined as a witness in the case and the plaintiff might certainly have been able to prove that there was proper attestation. In *Sricharan* v. *Makhan Lal* (1) it was held that the objection that a mortgage bond is not duly attested cannot be allowed to be taken for the first time in the appellate court as it raises a question of mixed law and fact. In the present case the objection was not raised properly before the District Munsif and the Subordinate Judge was right in disallowing it. We have been referred by the appellant to some cases *Shamu Pattar* v. *Abdul Kadir Ravuthan* (2), *Vadla Nagiah* v. *Valuru Divakara Mudaliar* (3) and *Muniappa Chettiar* v. *Vellachamy Hannadai* (4) but in these cases an issue had been framed in the trying Court with reference to the question of validity and that distinguishes those cases from the present case. The respondent has referred us to *Satis Chandra Mitra* v. *Jogendranath Mahalanabis* (5). That was a case which dealt with the question of proof of execution and not with the question of validity but it is there pointed out that the admission of the party to the document of its

1. (1918) 51 I. C. 378. 2. (1912) I L R 35 M 607 : 23 M L J 321 (P C)
3. (1917) M W N 583. 4. (1918) M W N 853.
5. (1917) I L R 44 C 345.

Rangaswami Aiyangar v. Veeraraghavachari

Hughes, J.

execution would dispense with the necessity of all further proof as against him. This is of some importance as indicating that in such a case it is only where the question of invalidity is raised that it would be necessary to go into evidence with respect to the attestation. The question was not properly raised before the District Munsif ; the evidence on that point before him was incomplete ; and even as it stood did not establish the fact that Ex. A was not duly attested and on the record the District Munsif was not bound to frame an issue and he was not asked to do so. The Subordinate Judge rightly disallowed the question and it cannot be allowed to be raised here. The second point argued in this appeal is that in Ex. A, the mortgage deed, there is no personal covenant on the part of defendant to pay. Several cases have been referred to, but where it is a question of construction of a document cases are not very helpful, for each document has to be considered on its own merits. Ex. A recites "I have this day usufrutuarily mortgaged to you survey No. 5000, 1 acre and 5 cents of land which my wife Ranganayaki Ammal was enjoying and which I have got by exchange and am enjoying in the village of Poundareekapuram attached to Thiruvadamaruthur Maganam, Tiruvadamaruthur Sub District in Kumbakonam Taluq and the amount which I get thereon as a loan is Rs. 1,000 * * * * * You shall yourself enjoy the said land from this date in lieu of interest and having paid the amount of the principal by 7th July 1917, having endorsed on this deed I shall enjoy the said land, * * If the amount be repaid at the cultivation season of any Ani month after due date on which it falls due, the same must be received in full and the land restored to my possession."

The case in *Hakeem Pattee Muhammad* v. *Shaik Davood* (6) has been referred to but in that case it seems to have been taken for granted that there was no covenant to pay. In the case in *Rangayya Pillai* v *Narasimha Iyengar* (7) the report does not contain the full terms of the document and the judgment only construes the proviso which is similar to the last sentence in Ex. A and states that there are no other recitals in the deed to suggest that there was any personal covenant. I do not think that the case in *Kunhimaikutty Beari* v. *Helekota-Aisabi* (8) helps us. But the case in *Sivakami Ammal* v. *Gopala Savundram Ayyan* (9) is useful, as it shows that the proviso at

6. (1915) I L R 39 M 1010 . 29 M L J 525. 7. (1918) M W N 672.
8. (1920) 13 L W 434. 9. (1893) I L R 17 M 131 4 M L J 50 (F.B.)

Rangaswami Aiyangar v. Veeraraghavachari

Hughes, J.

the end of Ex. A is simply to limit the discretion of the mortgagor to repay the money at a season when the land could not be bringing the mortgagee any profit. The case in *Kangayya Gurukkal* v. *Kalimuthu Annavi* (10) seems to be very much in point. It deals with a document drawn up in terms very similar to the deed under consideration and decides there was a personal covenant to pay. Ex. A fixes a date for payment and recites that the mortgagor having paid the money by the date will take back the land. I am satisfied there is a personal covenant to pay.

The appeal must therefore be dismissed with costs.

Odgers. J

Odgers, J. :—With regard to the first point, I would content myself with saying that it is not proved on the evidence that the mortgage deed (Ex. A) was not duly attested according to law. The plaintiff's witnesses were called to prove a totally different point—now given up by the appellant—and the evidence of one of them may not be inconsistent with due attestation.

There was also admittedly a third attestor who was not called. The question of the validity of the mortgage was never put in issue—was in fact admitted by the defendant in his written statement. It is obvious that it would be dangerous to remit the case for a finding on this question now, even supposing it were open to us to do so. The point fails. As to the covenant in Ex. A we have had the material parts of Ex. A retranslated by the Chief Interpreter. They now appear as hereunder set forth. The mortgage is either a pure usufructuary mortgage or a combination of simple and usufructuary as recognised in S. 98, Transfer of Property Act. The appellant contends it is the former and that the clauses " Having paid the principal amount before the 7th July 1917 and having credited (endorsed) in this deed, I shall enjoy the said land " and " if even after the fixed time money is paid at the cultivation season of any Ani month, (you shall) receive in full and deliver the land to my possession. " (The Chief Interpreter's translation) are undoubted proof for the benefit of the mortgagee, *viz.*, that he may have (1) the benefit of a fixed term and (2) may not be called upon to deliver up possession in the middle of a cultivation season. I cannot agree. The document Ex. A is executed by the mortgagor Rangaswami Iyengar (the appellant) alone and the reasonable construction is, in

10. (1903) I L R 27 M 526 : 14 M L J 61 (F. B.)

Rangaswami Aiyangar v. Veeraraghavachari

Odgers, J.

my opinion, that he took upon himself the obligation by these clauses. The words used are very similar to those considered in *Kangayya Gurukkal* v. *Kalimuthu Annavi* (10) where it was held they constituted a promise to pay. *Cf.* also *Sivakami Ammal* v. *Gopala Savundram Ayyar* (9) also a Full Bench ruling. The case in *Hakeem Muhammad* v. *Shaik Davood* (6) was an instance of an anamolous mortgage under S. 98, Transfer of Property Act and the Court held that the words of the document must prevail and that S. 60, Transfer of Property Act, had no application. In *Rangayya Pillai* v. *Narasimha Aiyangar* (7) there was no definite date fixed for repayment as here and it is held that the word as to repayment was entirely for the benefit of the mortgagor who could pay when he liked. In *Luchmeshar Singh* v. *Dookh Mochan Jha* (11), the stipulation was in a different form and the learned Judges held that the words used only preserved a right of redemption to the mortgagor. If this case conflicts with the Madras Full Bench decision we are of course bound by the latter. As my learned brother has pointed out a document of this sort must be construed with reference to its own terms and circumstances. I think here there is a distinct promise in Ex. A to pay by the 7th July 1917 and that the second clause is not inconsistent with this view as held by the Full Bench in *Sivakami Ammal* v. *Gopala Saundram Ayyan* (9).

I therefore agree that the Second Appeal fails and must be dismissed with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLER.

Kona Thimma Reddi *Appellant* (Plaintiff).*

v.

The Secretary of State for India in Council represented by the Collector of Anantapur. *Respondent (Defendant).*

Kona Thimma Reddi v. The Secretary of State for India.

Madras Local Boards Act,* 1884, *Ss.* 16, 144—*Rules* 33 (*e*) *and* 35 *of rules framed under S.* 144—*Validity—Order setting aside election on ground specified in R.* 33 (*e*)—*Validity—Inquiry—Opportunity to show cause against order—

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*Second Appeal No. 361 of 1921. 27th September, 1923.

10. (1903) I L R 27 M 526 (F. B.) 9. (1893) I. L. R. 17 M. 131 (F. B.)
6. (1915) I L R 39 M 1010 : 29 M L J 525. 7. (1918) M W N 672.
11. (1896) I L R 24 C 677.

Necessity—Rule authorised by Act but purporting to be framed under wrong section—Validity.

Rule 33 (*e*) and Rule 35 of the rules framed by the Local Government under S. 144 of the Madras Local Boards Act of 1884 are not *ultra vires.*

An order setting aside the election of a person on the ground specified in R. 33 (e), that is that the presence of the person in the Taluq Board as a member would bring the Local Fund Administration into contempt is not invalid on the ground that there was no enquiry by the Government into the matter, and that no opportunity was given to the person affected to show cause against the allegations made against him.

Where the Government makes a rule which it is empowered by the Act to make, the fact that it purports to make the rule under one section rather than another would not be a ground for holding that the rule is *ultra vires.*

Second appeal against the decree of the District Court of Anantapur in A. S. No. 63 of 1920 (A. S. No. 164 of 1917, District Court, Cuddappah) preferred against the decree of the District Munsif of Gooty in O. S. No. 750 of 1916.

T. Richmond for appellant.

The Government Pleader (*C. V Anantakrishna Iyer*) for respondents.

The Court delivered the following

JUDGMENT :—This appeal arises out of a suit filed by the plaintiff against the Secretary of State for India in Council for a declaration that the Government Order cancelling his election to the Gooty Taluq Board is *ultra vires* and illegal and does not affect the validity of his election, for a mandatory injunction directing his name to be published in the Fort St. George Gazette as duly elected, for an injunction prohibiting the Government from publishing the name of his rival candidate Subba Rao and for the recovery of Rs. 100 as damages. No evidence has been adduced in the suit. The election in question was held on the 13th of November 1915. It is not disputed that the plaintiff obtained the majority of votes, that the defeated candidate Subba Rao put in an objection petition and that the Government set aside the election of the plaintiff and ordered a fresh election on the ground that the plaintiff's presence in the Taluq Board as a member would bring the Local Fund Administration into contempt. This order of the Government is questioned by the plaintiff on two grounds. The first is that the rules under which the Government purported to act are *ultra vires* and that consequently he is not affected by the Order and secondly that even, if the rules are *intra vires,* there was no enquiry by the Government into the matter, that he was not given an opportunity of showing cause against the allegations made by the rival candidate and that on the merits it could not be

Kona Thimma Reddi v. The Secretary of State for India.

said that his presence in the Taluq Board would have the undesirable consequences referred to by the Government as a ground for invalidating his election. He sets out his qualifications in the plaint.

The defence by the Secretary of State for India in Council was that the rules framed by the Government are valid, that under the rules the Government was not bound to give any notice to the plaintiff, that the discretion vested in the Government is absolute and unquestionable by a Civil Court and that the Government having made such enquiry as it thought fit and having come to the conclusion that it came, it was not open to the plaintiff to question the validity of its act. The Government denies that the Plaintiff is entitled to any damages.

Two points were argued by Mr. Richmond before us in Second Appeal. The first was that the rules were *ultra vires* and the second was that the whole proceedings were vitiated by the fact that no notice was given to plaintiff who consequently had no opportunity to show cause against the objections raised by his rival candidate—a violation of the elementary principles of natural justice—which, without more, would invalidate the proceedings.

As regards the first point, S. 16 of the Local Boards Act runs as follows :—" The other members of the Taluk Board may be (*a*) either wholly appointed by the Governor in Council or (*b*) partly so appointed and partly appointed by election by the members of the panchayats in the taluq from among their own number or by the tax payers and inhabitants of the taluq, subject to such rules and conditions as may from time to time be prescribed by the Governor in Council. S. 144 of the Act provides that the Governor in Council may, from time to time, frame forms for any proceedings for which he considers that a form should be provided, and make rules consistent with the Act—(1-*a*) as to the qualification of electors and of candidates for appointment as members of a panchayat by election and the method and time of appointment of members of a Panchayat by election in regard to the following matters. Then follow a number of matters specified in sub-cls. (*a*) to (*f*), (*f*) being " any other matters regarding the system of representation and of election. " The Government have framed rules which purport to have been made under sub-S. (1) of S. 144 of the

Kona Thimma Reddi v. The Secretary of State for India.

Local Boards Act and directed that the rules should come into operation on the 1st of January, 1916. Rule 33 provides that the validity of any election may be questioned by a petition put in before the Collector of the District or the Divisional Officer within fifteen days after the result of the election has been declared, by any candidate who has not withdrawn or by not less than ten persons who have voted at the election on any of the grounds mentioned therein. Ground (*e*) which is the only material ground necessary to be considered for purposes of this appeal runs as follows :—" That the person whose election is questioned is likely to bring the local fund administration into contempt or that his being a member of the taluq board is dangerous to the public peace or order. " It provides that the Governor in Council or the Collector may act *suo motu* and take action on any facts affecting the validity of an election which may be brought to his notice whether by a petition by a rival candidate or otherwise. Rule 35 which is material for the consideration of the objection raised by Mr. Richmond runs as follows :—" Objections to the validity of an election on the ground specified in R. 33 (*e*) (*i. e.* that the person whose election is questioned is likely to bring the local fund administration into contempt or that his being a member of the taluq board is dangerous to the public peace or order) and objections on the ground of disqualification under R. 9 (*d*) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government. In all other cases of objection under R. 33 an enquiry shall be held by the Collector or at his discretion by the Divisional Officer, at which the contending parties shall have an opportunity of appearing in person or by representative, and orders shall be passed on the result of the enquiry by the Collector who may, at his discretion, dismiss the petition or, if he finds the election invalid, either order a new election or declare that the candidate who obtained the next highest number of votes to the candidate or candidates disqualified or found not to have been validly elected has been duly elected. Provided that before declaring such next candidate to have been duly elected, the Collector shall notify his intention to do so to the other candidates and the petitioners who have impugned the election and shall consider any objections which may be lodged by them in writing within ten days from the date of such notice. No appeal shall lie against the orders of the Collector passed under this rule."

Kona Thimma Reddi v. The Secretary of State for India.

It is therefore clear from the rules that so far as the objection that the person elected is likely to bring the local fund administration into contempt is concerned, no notice to the person affected and no enquiry are contemplated by the rules the reason very probably being that an enquiry into the nature of the ground referred to in clause (e) is not desirable in public interests. It is contended by Mr. Richmond that the right of a person who is duly elected to a public office is a right which he is entitled to vindicate in a Civil Court and that it is not open to the Government by rules framed under the Act to create a forum and thus deprive the person elected of his ordinary legal remedies. It is also contended that as the rule purports to be framed under sub-S. (1) of S. 144 of the Local Boards Act, they could only embrace the subject specified in that clause as the matters to be dealt with by the rules and as none of those matters relate to enquires into disputed elections, they cannot be relied on by the Government for the purpose now in question. We are unable to agree with either of these contentions. The Local Boards being creations of Statute and that statute having given power to the Government to frame rules for the purpose of working the Act, we think it is perfectly open to the Government to create a forum for the purpose of deciding disputes as to elections directed to be carried out under the provisions of the Act. The Government in passing the Local Boards Act has not taken away any rights which had previously vested on the public and it is difficult to see how it can be said that restrictions could not be imposed by the Government acting on the rule-making power conferred by an enactment which creates new rights so long as the rules are not repugnant to any of the provisions of the Act. Nor do we think that, if power is given to make rules by the Act, the fact that the Government purports to make rules under one section rather than another would be a ground for holding that the rules are *ultra vires*.

In *Lakshminarasimha Somayagiar* v. *Ramalingam Pillai* (1) the question arose as to whether under the Local Boards Act the Governor in Council has power to make rules ousting the jurisdiction of Civil Courts as to objections to the validity of elections. Sadasiva Iyer, J., was inclined to the view that the Governor-in-Council has no power to make rules and that the rules framed by the Government are invalid. The learned Judge was of opinion that S. 16 was too vague and that, as the rules were not made under S. 16 but only under

1. (1920) 39 M. L. J. 319.

Kona himma Reddi v. The Secretary of State for India

S. 144 (1) which merely deals with the power to make rules as to the qualifications of the electors and of candidates for appointments by election and as to the method and time of election and of elective Presidents, vice-presidents and members of local boards, the power constituting a special tribunal to enquire into the validity of elections was not conferred by S. 144 (1) under which the present rules purport to be framed. Spencer, J., was of opinion that the rules were valid and that Ss. 16 and 144 gave the Government power to frame rules relating to the adjudication of disputes as regards the validity of election. After referring to Ss. 16 and 144 the learned Judge observes as follows: "But in any case I think that the words 'any other matters regarding the system of representation and of election' illustrate what is meant in clause (1) by the words 'method of election' of members of Local Boards. I think these words are wide enough to cover the power of making rules to provide for the whole scheme of elections and for the conduct of enquiries into complaints and objections to elections held or about to be held as well as to objections to the list of voters." We agree with the view taken by Spencer, J.

The question as to the validity of the rules framed under the District Municipalities Act arose for determination in more than one case. The Ditsrict Municipalities Act contains provisions analogous to those in the Local Boards Act with regard to the matter in question. Sub-clauses 1 to 6 of S. 250 (1) (a) of the District Municipalities Act correspond to sub-clauses (a) to (f) of S. 144 (1-a) of the Local Boards Act and give power to the Government to make rules with reference to the matters specified in that section. S. 10 of the District Municipalities Act also contemplates the power of the Government to make rules. Rules were framed under the powers conferred by the District Municipalities Act. Rules 34 and 35 provides for cases of disputes as regards the validity of elections and rule 35 (d) which is one of the grounds for setting aside an election is that the person is likely to bring the Municipal administration into contempt or that his being a Municipal Councillor is dangerous to the public peace or order. Rule 36 provides that in cases falling under rule 35 (d) orders should be passed by the Government and not by the Collector. In *Secretary of State for India* v. *Appa Rao* (2) the question arose as the power of Government to frame rules under the

2. (1923) 45 M. L. J. 156.

Kona Thimma Reddi v. The Secretary of State for India.

District Municipalities Act. Krishan, J., was of opinion that the fact that the Government purported to frame rules under one sub-clause which did not refer to the matter rather than another which did so refer would not make rules *ultra vires* and observed as follows :—" Before a rule framed by a rule making authority is declared *ultra vires*, the Court must be satisfied not only that it had no power to act under the power under which it purported to act, but also that it had no power at all under any law to so act. If power can be found elsewhere from the section quoted, the rules will be referred to that power and held not to be *ultra vires.*" The learned Judge referred to *Rajan Chetty* v. *Seshayya* (3), *Queen Empress* v. *Ganga Ram* (4) and Halsbury, Vol. 27, page 146. In *Secretary of State for India* v. *Venkatesa Naidu* (5) the question arose as to the validity of the rules framed under S. 250 (1) of the District Municipalities Act IV of 1884 as amended by Act III of 1897. Rules were framed under S. 250 as regards the power of the Government to veto the election of a person if, before his election, he is convicted of an offence which, in the opinion of the Governor in Council, disqualifies him from being a councillor. The plaintiff who was the respondent in the appeal was elected as a Municipal Councillor but the Government set aside the election on the ground that he was guilty of such an offence as unfits him to be a municipal councillor. The District Judge found that some of the rules framed under the Act were *ultra vires*. Referring to the contention that S. 250 (1) (*a*) does not provide for a rule of the nature of rule 35 (*a*) (*b*) framed under it, Miller, J., observed as follows :—" I am not prepared to decide that that is so, for it is not clear to me that S. 250, cl. (1) (*a*) (*i*), (*vi*) or (*vii*) would not cover the case. But even if it be so, the rule may be attributed to the power given by S. 10 to prescribe conditions ; and if the power is there, the rule is good though it purports to have been made under a different section. " The learned Judge held that the rule was not *ultra vires* and illegal. Wallis, J. was also of the same opinion. We think that Ss. 16 and 144 read together give power to the Government to make rules when an election is contested and also to frame rules declaring the qualifications required of a person before he is validly elected and that the rules framed by the Government are not *ultra vires*.

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3. (1894) I. L. R. 18 M. 236 (F. B.)
4. (1894) I. L. R. 16 A 136.
5. (1906) I. L. R. 30 M 113

Kona Thimma Reddi v The Secretary of State for India

Turning to the next question that the appellant was not given an opportunity to be heard before the Government passed orders, it is clear from the rules we have already referred to that no enquiry is contemplated. Rule 35 states that objections to the validity of an election on the ground specified in R. 33 (*e*) and objections on the ground of disqualification under R. 9 (*d*) and all cases which involve an interpretation of the rules shall be referred by the Collector for the decision of the Government which shall be final and that in *all other cases* of objection under R. 33 an enquiry shall be held by the Collector, etc. It is clear therefore that no enquiry is necessary. If the rule is valid, it seems to us that the Government has power to declare what shall be the nature and scope of the enquiry. Reference was made to the *Secretary of State for India* v. *Venkatesalu Naidu* (3), already referred to where it was held that an enquiry was necessary before an election can be invalidated under Rr. 35 and 36 framed under the District Municipalities Act. But R. 35 requires an enquiry and the decision therefore cannot have any application to cases where no enquiry is required. We may point out that the Local Boards Act provides for enquiries whenever the Government thinks it necessary that the person affected ought to have notice, for example, S. 24, cl. (*iii*) provides for the removal of a president, vice-president or member of a taluq board whose continuance in office is, in the opinion of the Government, dangerous to public peace or order or likely to bring the administration of the local board into contempt. But cl. (*ii*) states that when action is proposed to be taken in that matter no order shall be passed without giving an opportunity of explanation to the president, vice-president or member concerned.

We are therefore of opinion that both the objections taken fail. It is not necessary to consider the further question whether an action for damages would lie against the Secretary of State for India assuming that the rules framed by the Government were *ultra vires*. In the result the second appeal fails and is dismissed with costs.

A. S. V. ——— *Second Appeal dismissed.*

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3. (1906) I L R 30 M 113.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLER.

The Commissioner of Income Tax, Madras .. *Referring Officer**.

v.

M. Ar. Ar. Arunachalam Chettiar *Respondent.*

The Commissioner of Income Tax, Madras *v* Arunachalam Chettiar

Income Tax Act II of 1922, Ss. 6, 10 and 24—Assessee—Set-off—Right of—Trade in individual capacity—Trade as member of unregistered firm —Loss incurred in latter—Set-off against profits made in former—Right of—S. 10 " any "—Meaning—S. 24 (1) *and* (2)—*Applicability and effect.*

A person who carries on two different trades, one individually and the other as a member of an unregistered firm, is entitled to set-off (for income-tax purposes) the loss incurred by him in respect of the partnership trade against the profits made by him in his individual capacity.

Though the practice is to assess firms as such, each partner in a firm is an assessee in respect of the profits and gains of the business which he carries on in partnership.

The word " any " in S. 10 of the Income Tax Act means " each and every ;" and an assessee is therefore entitled to set off profits in one business against losses in another. For this purpose there is no distinction between what an assessee earns alone and what he earns in partnership.

A partnership is, for income-tax purposes, not an entity known to the law ; and there is, for this purpose, no distinction between registered and unregistered firms.

Case stated under S. 66 (2) of the Income Tax Act XI of 1922 for the decision of the High Court, the following question of law which has arisen in assessing the respondent herein, *viz.* M. Ar. Ar. Arunachalam Chettiar for the year 1922—1923.

" Where a person carries on two different trades one individually and the other as a member of an unregistered firm, is he entitled to set off the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade ?"

The Government Pleader (C. V Anantakrishna Aiyar) on behalf of the Referring Officer.

A. Krishnaswami Aiyar and *V Rajagopala Aiyar* for the respondent.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—The question referred is, " Where a person carries on two different trades one

*R C No. 6 of 1923. 12th October, 1923.

individually and the other as a member of an unregistered firm, is he entitled to set off (that is, for income-tax purposes), the loss incurred by him in respect of the partnership trade against the profits made by him in his individual trade ?"

The facts are that the assessee has an income from trade profits in two distinct and separate businesses of his own and from other property, has made losses in other businesses of his own, and also has incurred losses in two distinct businesses in which he is a partner and which businesses are not registered.

The question for decision is a difficult one, the difficulty arising from the wording of the Income Tax Act. If our decision is not in accordance with the real intention of the legislature, it is for the legislature to make that intention clear hereafter. The relevant sections for consideration are 6, 10 and 24, and the difficulty is to ascertain the proper interpretation of the two latter. Section 6 is merely a division into heads of the different sources of income, one being 'business' concluding with a general head of 'Other Sources.' Section 10 defines and elaborates the profits and gains covered by the heading 'Business.' The tax is payable by an assessee under the head 'Business' in respect of the profits or gains of any business carried on by him. 'Assessee' is defined in S. 2 as 'a person by whom income-tax is payable' No mention is made in S. 10 of partnerships registered or unregistered, and, although it is the practice to assess firms as such, I can find nothing to justify the argument that each partner in a firm is not an assessee, for he is a person by whom the income-tax is payable'; nor can I find anything to justify the argument that this assessee, being a partner, is not a person carrying on the business in question. I am, therefore, prepared to hold that the present assessee is an assessee in respect of the profits and gains of the businesses which he carries on in partnership.

The next question that arises is, where an assessee carries on two distinct businesses, is he entitled to set off the loss on one against the profits of the other ? The Crown has argued before us to the contrary, but it is to be observed that this is not the view taken by the Commissioner. Indeed, he states that such set off has been allowed in respect of the separate businesses of the assessee which he carried on alone, namely, his money-lending business and his Bell-metal factory, and it would from the reference seem to be his view that, if the

The Commissioner of Income Tax, Madras v. Arunachalam Chettiar
Sir Walter Schwabe, C. J.

partnerships had been registered, such set off would be allowable also in respect of the losses of the partnership businesses.

The Crown's argument is based on the words of S. 10 which refers to the profits of any business and would have us construe 'any' as 'each and every.' Counsel points to the English Income Tax Act which under Sch. D makes chargeable to income-tax the profits and gains from any trade, and then by special rule, namely, R. 15 of the rules applicable to cases I and II, (case I being that in respect of trade), provides that the losses of one business can be set off against the profits of another. This re-enacts S. 101 of the Income Tax Act of 1842. It is argued that, if such a section was necessary in England, it follows that its omission here shows that it was not intended to allow such set off here. I have already pointed out that that is not the view of the Commissioner, and if it were the intention, it would indeed be anomalous ; for by S. 24 (1) set off is allowed between the different heads of income, so that a trade loss can be set off against a professional gain or interest on securities a privilege not allowed in England, while an adjustment of profit and loss between different businesses incurred by the same person would be allowable in England and not here, although the arguments in favour of such allowance are at least as strong as those in favour of those governed by S. 24. What it is desired to tax is a man's total net income and it would be most unjust to tax him on a profit on one business when, in fact, owing to losses on the other, he has a less or even no income at all. I do not believe that this was the intention of the Act, and I doubt whether R. 15 in the English Act was necessary, except to make clear the intention of the legislature and, in my judgment, looking at the Indian Act alone, the words 'any business' being open to either construction, I must take that construction which, looking at the whole Act, I think, is the more rational and must construe 'any' to mean 'each and every' It follows that an assessee is entitled to set off profits in one business against losses in another. And for this purpose, I can find no distinction between what an assessee earns alone and what he earns in partnership. It is argued by the Commissioner that a partnership is, for income-tax purposes, an entity, but it is not an entity known to the law it is not a separate entity like a company limited by shares, its name is merely a convenient method of describing its partners, each of whom is jointly and severally liable for its debts, and, for income-tax purposes, it is a convenient body to assess, as

The Commissioner of Income Tax Madras v. Arunachalam Chettiar

Sir Walter Schwabe, C. J.

the partners carry on the trade together and keep books in which the partnership transactions are entered and earn together profits or make losses. It is to be observed that for this purpose no distinction can be made between registered and unregistered firms for whether a firm is a legal entity or not, does not depend on registration.

It is then argued that S. 24 shows an intention that such set off is not to be allowed in the case of unregistered firms. But S. 24 (1) is dealing with something quite different, namely, the allowance of set off between different heads mentioned in S. 6 and not the allowance of set off between different businesses coming under one head. S. 24 (2) again dealing with set off between different heads allows the partners of a registered firm, where that firm has made a loss under one head and has not sufficient income under another head, to avail themselves of this set off, to use the loss to set off against their own individual incomes arising under other heads. Whether this must be taken by implication to prevent such set off in the case of partners of an unregistered firm is a different question which does not arise here, as the present assessee desires to set off his partnership loss against a loss of his own under the same head, that is ' Business ' and not under a different head. I do not think that we should be justified in inferring from this section the intention of the legislature to prevent any sort of set off by a partner of an unregistered firm against his own trade losses.

It follows that the answer to the question is in the affirmative and the assessee is entitled to his costs.

Wallace, J. :—I agree and I have nothing to add.

A. S. V. ———— *Answer in the affirmative*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE COLERIDGE.

Kaveribai Ammal by Agent S. L. Narayana Rao *Appellant** (*Defendant*).

v.

B. Mehta and Sons *Respondents* (*Plaintiffs*).

Kaveribai Ammal v Mehta & Sons.

Letters Patent (Madras), Cl. 15—" Judgment "—Appealability—Order of single Judge refusing to alter the terms of sale proclamation and to adjourn sale.

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*O S Appeal No. 41 of 1923. 24th April, 1923

Kaveribai Ammal *v* Mehta & Sons.

An order of a single Judge of the High Court on the original side refusing to alter the upset price fixed in a proclamation of sale or to direct the sale of the property in lots or to postpone the date of sale, is an interlocutory order against which no appeal lies under cl. 15 of the Letters Patent.

Tuljaram Row v. *Alagappa Chettiar*, I L R 35 M 1 21 M L J 1 (F B) relied on.

Quaere : Whether the decision in *Sivagami Achi* v. *Subramania Aiyar*, I L R 27 M 259 (F B) is good law under the Code of Civil Procedure, 1908.

On appeal from the order of the Hon'ble Mr. Justice Kumaraswami Sastri, dated 3rd April, 1923, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 321 of 1922.

L. S. Veeraraghava Aiyar and *A. Ramakrishna Aiyar* for appellant.

T. Ethiraja Mudaliar for respondents.

The Court delivered the following

Sir Walter Schwabe C. J.

JUDGMENTS :—*The Chief Justice* :—This is an interlocutory appeal from an order of Kumaraswami Sastri, J. sitting on the original side refusing the application by Judge's summons to alter the price fixed as the upset price in the proclamation of sale, to alter the mode of selling of certain part of the property into a sale as a whole and to postpone the date of the sale.

The suit was a mortgage suit. The preliminary decree gave what seems to be a short time of three months for redeeming. That time having elapsed, no application having been made for extension of the time and no appeal having been taken from the preliminary decree, a final decree was passed ordering a sale. The Court then directed the sale on a certain day and in the ordinary way under O. 21, R. 66 caused a proclamation to be drawn up. Thereafter this summons was taken out and the learned Judge having dismissed it, this appeal is brought to this Court ; and the question is whether such an appeal lies.

Under the Code of Civil Procedure then in existence, which is in many ways similar on this matter to the present Code, a Full Bench of this Court in *Sivagami Achi* v. *Subramania Aiyar* (1) held that the Court in exercising its powers in settling the terms of the sale proclamation acts ministerially and not judicially, and that therefore no appeal lies. I think it is true to say that for the purpose of that decision it was not necessary so to hold ; but, however that may be, that is a finding of the Full Bench. Speaking for myself, I have very

1. (1904) I L R 27 M 259 : 14 M L J 59 (F B).

Kaveribai Ammal v. Mehta and Sons. Sir Walter Schwabe, C. J.

great doubts as to whether it is a correct finding or not, but it is a finding by which we are bound, provided there is nothing in the alteration in the Code to make it no longer applicable. On that, an interesting argument has been addressed to us and I should myself desire to refer that question to a Full Bench if I considered it necessary to follow that case in order to decide the point before us, but I do not think it is. The question to be determined here must turn on the proper interpretation of the cl. 15 of the Letters Patent, which says "We further ordain that an appeal shall lie from the judgment (not being an order of a certain kind) of one Judge of this Court." There is no doubt that those words give a right to appeal in respect of many kinds of orders, and the law, so far as this Court is concerned, is to be found in the Full Bench decision in *Tuljaram Rao* v. *Alagappa Chettiar* (2) where a very large number of instances were given of orders which were appealable and one or two instances were given of orders which were not appealable and the Court came to the conclusion that the kind of order that was not appealable was an order which was described as merely interlocutory. In my judgment, the order in this case was merely interlocutory. It does not finally dispose of the rights of the parties at all. I should add that, in so far as it is an application to extend the time for the purpose of allowing the amount of the decree, to be raised by mortgage or by private sale of such property, the Court of first instance by reason of the terms of O. 21, R. 83 (3) was expressly forbidden to make such order, and on that ground the Court had no power to make such an order and no appeal can lie from its refusal to do so. So far as the question of granting further time is concerned, the power of the Court below to do so must be sought under O. 21, R. 69 which says that the Court, in its discretion may adjourn a sale to a specified day and in my view, the order in the exercise of that discretion is an order of a merely interlocutory nature. I think the same applies to the question here whether there should be an alteration of the terms of the sale proclamation by raising the upset price and dividing the property into lots. The matter is so purely one of discretion of the lower Court not affecting the final rights of the parties at all that it ought to be treated as merely interlocutory.

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2. (1910) I L R 35 M 1 21 M L J 1 (F B).

Kaveribai Ammal v. Mehta and Sons, — Sir Walter Schwabe, C. J.

On these grounds, this preliminary point succeeds and this appeal must be dismissed with costs.

Coleridge, J. :—I agree.

I should like to add that in my opinion *Sivagauri Achi* v. *Subramania Aiyar* (1) needs to be reconsidered by a Full Bench as in my opinion the alteration of the Code was deliberate and was intended to take away the ministerial functions that were alleged to be vested in the Court and distinctly made it a judicial function from which an appeal will lie.

A. V. V. ——— *Appeal dismissed.*

IN TH HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLER.

V. A. Subba Rao *Appellant* (Plaintiff).*

v.

Ponnammai Nadathi *alias* Pakkiammal Nadathi (dead) and others *Respondents (Defendants Nos. 1 to 4).*

Subba Rao v. Pakkiammal Nadathi.

Transfer of Property Act S. 83—Deposit of mortgage money—Money paid to the account of legal representatives of mortgagee and sub-mortgagee—Validity of deposit.

The expression "Mortgagee" in S. 83 of the Transfer of Property Act includes the legal representatives and assigns of the mortgagee. A sub-mortgage is in substance an assignment of the mortgage. Consequently a deposit by the mortgagor of the mortgage money as payable both to the legal representatives of the deceased mortgagee and his sub-mortgagee is valid.

Second appeal against the decree of the Court of the Additional Sub-Judge of Tinnevelly in A. S. No. 163 of 1920 (Appeal No. 429 of 1919 on the file of the District Court, Tinnevelly) preferred against the decree of the Court of the Additional District Munsif of Tinnevelly in O. S. No. 515 of 1917.

S. Ramaswami Aiyar for appellant

C. S. Venkatachari for respondents

The Court delivered the following

JUDGMENT :—This second appeal arises out of a suit by appellant to redeem a mortgage executed by him in favour of the husband of the 1st defendant who died leaving the 1st defendant, his widow, and defendants 2 and 3, his minor daughters. The 1st defendant in 1909 and after her husband's

*S. A. No. 194 of 1921. 13th September, 1923.

1. (1903) I L R 27 M 259 : 14 M L J 57 (F B).

Subba Rao v. Pakkiamma Nadathi.

death sub-mortgaged the property and the 4th defendant claims to be entitled to the amount due on the sub-mortgage. The contention of defendants 1 to 3 is that the sub-mortgage originally created by the 1st defendant was a nominal transaction. The District Munsif found that the sub-mortgage was a genuine transaction supported by consideration but the Subordinate Judge on appeal reversed the decree on this point. In 1917, the appellant filed O. P. No. 33 of 1917 and deposited inCourt the amount due on the mortgage. It is not disputed that the amount deposited was the amount legally payable on the mortgage. He seems to have stated that there was a sub-mortgage and that the 4th defendant claimed under it. Notice was issued to defendants 1 to 3 and to the 4th defendant. Owing to the contention raised by 1st defendant that the sub-mortgage was nominal and that the 4th defendant was not entitled to any portion of the money deposited in Court, the money was not paid to anybody but remained in Court. It was after decree in the suit (O. S. No. 515 of 1917) ordered to be paid out by the District Munsif to the 4th defendant who drew this sum.

The first question is whether the deposit made under the provisions of S. 83 of the Transfer of Property Act in O. P. No. 33 of 1917 was a proper one. S. 83 of the Act enacts that a mortgagor may, at any time before a suit for redemption is barred, deposit in a Court having jurisdiction to the account of the mortgagee the amount remaining due on the mortgage. There can be little doubt that the word 'mortgagee' includes the legal representatives and assigns of the mortgagee. It is argued that a sub-mortgagee is not an assign and that a deposit of the money as payable both to the legal representative and the sub-mortgagee is not a proper deposit.

We are unable to uphold this contention. Fisher in his Law on Mortgage observes " Mortgages are frequently transferred by way of sub-mortgage. In that case the sub-mortgage is a compound mortgage consisting of a mortgage of a chose in action, (*viz.*, the original mortgage debt) and of the property which is security for the original mortgage debt. " In cases of suits where there is a sub-mortgage, the decree has to direct an account of what is due on the original mortgage and of what is due on the sub-mortgage and payment of what is due on the sub-mortgage not exceeding the sum due on the original mortgage and the residue, if any, to the original mortgagee. Form No. 9, Appendix D to the Code of Civil Proce-

Subba Rao
v.
Pakkiammal
Nadathi.

dure refers to suits by a sub-mortgagee against the original mortgagor and mortgagee and shows that an account has to be taken on the above footing. Ghose in his work on the Law of Mortgages in India observes, "Debts secured by mortgage are also frequently assigned by way of security. Such transactions are known as sub-mortgages and may be evidenced merely by a deposit of title deeds. The sub-mortgagee by virtue of the assignment is not only entitled to the usual remedies against his own mortgagor but also against the original mortgagor." It is clear that a claim by a sub-mortgagee against the original mortgagor cannot be met by a plea of want of privity as the sub-mortgage is only an assignment of the original mortgagee's rights. Where the sub-mortgage is for an amount equal to or in excess of the original mortgage debt it will operate as a complete assignment, and if for any lesser sum, as an assignment *pro tanto*.

We have not been referred to any case where a deposit in Court under S. 83 of the Transfer of Property Act has been held to be bad owing to the assignee of the mortgage being stated as the person entitled to the money. Where a person having notice of an assignment pays the money into Court and names only the original mortgagee who has parted with his rights as the person entitled to receive the sum deposited we do not see how he can if the money is taken away resist a suit by the assignee of the mortgage before such deposit. [See *Narayana Mudali* v. *Raghavammal* (1)]. A sub-mortgagee will be a necessary party to a suit for redemption and we think that a deposit will not be bad merely because the petition states the persons entitled on the original and sub-mortgages and the Court issues notice to them. The case will of course be different if the mortgagor alleges claims of persons not the legal representatives or assigns of the mortgagee for the purpose of seeing that the money is not drawn out or of supporting the case of persons with no title.

We do not think that *Madhavi Ammal* v. *Kunhi Pathumma* (2) and *Debendra Mohan Roy* v *Sona Kunwar* (3) referred to by the respondent apply to the case of sub-mortgages. They were cases where strangers having no right in the mortgage were mentioned as persons entitled to the money deposited.

1. (1908) 18 M L J 462. 2. (1899) I L R 23 M 510.
3. (1904) I L R 26 A 291.

The fact that the mortgagee and sub-mortgagee have disputes *inter se* either as to the validity of the sub-mortgage or the amount due thereunder will not affect the mortgagor. Where the fact of a sub-mortgage is not disputed it is no part of the business of the mortgagor to decide whether the sub-mortgage is real or nominal. In the case of legal representatives it has been held in *Nagathal* v. *Arumugham Pillai* (4) that any dispute that may arise between the heirs as to their shares will not affect the mortgagor making the deposit and we can see no reason why a similar rule should not apply where disputes arise as to the right to the money between the mortgagee and the sub-mortgagee from him. A person executing a sub-mortgage and giving an apparent title should not cast on the mortgagor, a stranger, the duty of deciding who is entitled. To hold otherwise would in effect deprive the mortgagor of the rights given to him by S. 83 where a mortgagee disputes the effect of his own act in executing a document which on the face of it creates rights in another to the mortgage money.

We are of opinion that a sub-mortgage is an assignment of the mortgage and that having regard to the remedies of the sub-mortgagee a deposit in Court does not contravene the provisions of S. 83 of the Transfer of Property Act merely by reason of the fact that the mortgagor recites the sub-mortgage in his petition and the Court directs notice to issue and the money is owing to disputes between the mortgagee and his sub-mortgagee, not paid out.

The next question is as to the liability of the defendants for mesne profits. The 2nd and 3rd defendants are minor daughters and they cannot be liable for mesne profits owing to any wrongful act of their mother. So far as the 1st and 4th defendants are concerned it is immaterial to the plaintiff whether the 1st defendant continued in possession or parted with it to somebody else. 1st defendant died pending second appeal and her legal representatives are brought on record. If she created a sub-mortgage it was her duty to get back possession and hand it over to the mortgagor. The 1st defendant is found by the Subordinate Judge to be in possession. So far as the rate of mesne profits is concerned there is no dispute. We think that defendants 2 and 3 as legal representatives of the 1st defendant and out of her assets and 4 are jointly liable to pay the amount decreed for mesne profits.

4. (1923) 44 M L J 362.

Subba Rao v. Pakkiammal Nadathi.

As regards the amount deposited in Court in O. P. No. 33 of 1917 which has been drawn by 4th defendant we think that on the finding of the Subordinate Judge the 4th defendant is liable to pay the sum to the 1st defendant. As we hold that the deposit was valid there is no reason why the plaintiff should pay the sum over again. There will be a decree in favour of the 1st defendant against the 4th defendant for recovery of the amount drawn by him.

The decree of the Subordinate Judge will be modified as decided above. As the appellant has succeeded in all the grounds urged, respondents 1 and 4 will pay his costs of the appeal and in the Courts below.

A. V. V. ——— *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice*, MR. JUSTICE COUTTS-TROTTER AND MR. JUSTICE RAMESAM.

Sattayya Padayachi and others . *Appellants** (*Appellants in A. A. O. No.* 226 *of* 1922-*Defendants Nos.* 1 *and* 3 *to* 5 *and* 7 *to* 9).

v.

Soundarathachi *Respondent* (*Respondent in the same-Plaintiff.*)

Sattayya Padayachi v. Saundarathachi.

Civil Procedure Code O. 4 *R.* 1—*Presentation of plaint to Judge outside Court and out of office hours —Validity of.*

Where a Judge accepts a plaint presented to him outside Court and after the usual office hours, the suit must be deemed to have been instituted on the day on which the plaint was so presented.

Thakur Din Ram v. *Hari Das,* I L R 34 A 482 relied on.

Letters Patent Appeal under cl. 15 of the Letters Patent against the judgment ofthe Hon'ble Mr. Justice Venkatasubba Rao in A. A. O. No. 226 of 1922 preferred against the order of the District Court of East Tanjore at Negapatam in A. S. No. 1 of 1922 (O. S. No. 11 of 1921 on the file of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram).

K. Bhashyam Aiyangar for appellant.

S. Ramaswami Aiyar for *T V. Muthukrishna Aiyar* for respondent.

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*L P A No. 9 of 1923. 24th October, 1923.

Sattayya Pad ayachi v. Saundara-thachi.

Sir Walter Schwabe C, J.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal under the Letters Patent, Oldfield and Venkatasubba, Rao JJ. having differed in A. A. O. No. 226 of 1922.

The point is a very short one. The Judge of a Court in the Mofussil having risen for the day went to his club. At his club he was approached by a Vakil who asked him to receive a plaint, it being the last day for the expiration of the period of limitation. The learned Judge accepted the plaint and cancelled the stamp on it by writing upon it the words " presented to me by " giving the name of the Vakil " at 7-30 p. m., and signed and dated it. It is argued that nevertheless that suit is barred, because it has not been instituted within the period limit. S. 3 of the Limitation Act runs thus " Subject to the provisions contained in Ss. 4 to 25 (inclusive) every suit instituted, appeal preferred and application made after the period of limitation prescribed therefor by the first schedule shall be dismissed." It is argued that the suit was not instituted on that day. Now turning to the Code of Civil Procedure, O. IV R. 1 provides that " every suit shall be instituted by presenting a plaint to the Court or such officer as it appoints in this behalf." The Judge of the Court could appoint himself or any one else as the officer to whom a particular plaint was to be presented. There is nothing in the rule to show that the presentation must be within office hours, or must be to the officer appointed at the Court or at any particular place and I see no reason at all why if a Judge so chooses, he should not constitute himself the officer to receive the particular plaint at any place that he chooses. It is a matter which is not without authority, for precisely the same circumstances arose in *Thakur Din* v. *Hari Das* (1). In that case the memorandum of appeal was presented to the District Judge at his private residence after office hours and he accepted it taking the precaution to state that it would be admitted subject to his having got the power to do so. The Full Bench of Allahabad held that he had the power. The Division Bench here differs. Oldfield, J. stated that the ruling in *Thakur Din* v. *Hari Das* (1) had no application to Madras, because, although in Allahabad it might be the custom for judges to be approached outside Courts, in his experience it has not been so in Madras. Venkatasubba Rao, J., on the other hand, gave

1. (1912) I L R 34 A 482 (F B).

Sattara Padayachi v. Saundarathachi — Sir Walter Schwabe, C. J.

instances of the numerous kinds of applications to his knowledge that had been made to Judges in Madras when away from the Court and outside ordinary office hours.

I agree with the Full Bench decision in *Thakur Din* v. *Hari Das* (1), and I see no reason at all to say that the same principle should not be applied in Madras. The appeal will be dismissed with costs.

Coutts Trotter, J. :—I am of the same opinion. I think that what pressed Oldfield, J., was the idea that, if you state that a Judge may receive plaints in this way out of office hours, you are committed to the further proposition that he must, With great respect to the learned Judge, I think that that is a fallacy. I think that it is in the discretion of the Judge to act as he did in this case or refuse to do so ; and, if the thing became a nuisance, I have no doubt that judges would refuse to oblige litigants by taking documents in this way. I should like it to be understood that, so far as I am personally concerned, any such application would be received by me with great disfavour.

Ramesam, J. :—I agree with the judgments just delivered.

A. V. V. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Savanna Venka Ana Runa Vellayappa Chettiar *Appellant** (*Respondent*).

v.

M. L. M. Ramanathan Chettiar. .*Respondent* (*Petitioner*).

Vellayappa Chettiar v. Ramanathan Chettiar

Provincial Insolvency Act, Ss. 4 and 80—Insolvency—Sale of properties by official Receiver —Objection by claimant —Procedure —Power of Official Receiver to inquire.

Where in the course of an insolvency proceeding the Official Receiver either at his own instance or at the instance of a creditor proposes to sell properties claimed by a third person, the claimant may apply to the District Judge under S. 4 of the Provincial Insolvency Act for an order to prevent the sale of the properties. It is not competent to the claimant to apply to the Official Receiver or for the Official Receiver to adjudicate on the claim.

Appeal against the order of the District Court of Ramnad at Madura dated 28th November, 1921 and made in C. M.P. No. 832 of 1920 presented against the order of the Official

*A A O No. 261 of 1922. 15th October, 1923.

1. (1912) I L R 34 All 482 (F B).

Vellayappa Chettiar v. Ramanathan Chettiar

Receiver dated 21st November, 1920 and made in M. P. No. 126 of 1920 in I. P. No. 9 of 1919.

B. Sitarama Rao and *S. R. Muthuswami Aiyar* for appellant.

M. Patanjali Sastri and *C. S. Rama Rao Saheb* for respondents.

The Court delivered the following

JUDGMENT :—This appeal is from an insolvency proceeding before the District Judge of Madura. The Official Receiver seems to have made an attempt to sell certain properties, on which the appellant before us put forward a claim that such properties belonged to him and not to the insolvent and should not be sold. These properties were included in a mortgage decree obtained by the respondent against the insolvent. Strangely enough, the Official Receiver thought that he had power to dispose of a petition like this and thinking that a *prima facie* title had been made out by the claimant, he passed an order releasing the properties from sale, holding that the properties belonged to the claimant. On this the mortgage decree-holder conceiving that he was somehow or other aggrieved by the order put in an appeal to the District Judge. The District Judge thereupon came to the conclusion and rightly, in our opinion, that the secured creditor, the mortgage decree-holder, was not in any way bound by any proceedings taken by the Official Receiver in this matter. But he thought at the same time that the effect of the order, if allowed to stand, would be to deprive the secured creditor of his right of sale which conclusion we are unable to follow. The secured creditor undoubtedy was not at all affected by the order of the Official Receiver. On that the District Judge proceeded to allow the appeal petition before him and set aside the order of the Official Receiver without deciding whether the property actually belonged to the claimant or to the insolvent. The form of the order which was drawn up proceeded further and it declared that the claim petition put in by the claimant do stand dismissed. The effect of that order if left standing must necessarily be that the property should be treated as the insolvent's and not as the claimant's, a position which the District Judge did not arrive at in his judgment.

We think that the whole of the proceedings is misconceived. In the first place, the Official Receiver had no power to make any order in a claim petition. It is not a power which

Vellayappa Chettiar *v.* Ramanathan Chettiar.

has been delegated to him under S. 80 of the Provincial Insolvency Act, V of 1920. If the claimant wanted to prevent the sale of the properties as belonging to the insolvent, he should have applied to the District Judge direct to take action under S. 4 of the Act. He did not do so. That being so, we must set aside all the proceedings in the lower Court and leave the parties in *statu quo ante*. The claimant if he finds that the Official Receiver either at his own instance or at the instance of any creditor proposes to sell the properties which he claims to be his, may, if so advised, apply to the District Judge under S. 4 of the Act for a proper order to be passed.

We therefore allow the appeal and set aside all the proceedings in the lower Court and direct each party to bear his own costs.

A. V. V. ——— *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Messrs Ponnuswami Iyer and Narayana swami Iyer and another — *Appellants* (Plaintiffs and party appellant).*

v.

Damodar Hunsraj — *Respondent (Defendant).*

Ponnuswami Iyer and Narayanasami Iyer. *v.* Damodar. Hunsraj.

Civil Procedure Code, S. 20 (c)—Cause of action—Sale of goods by Calcutta firm to Madras firm—Payment of price by hundis—Suit for recovery of money overpaid—Forum.

Plaintiffs, a firm of merchants carrying on business in Madras, purchased goods from the defendants, a Calcutta firm. The arrangement as regards payment of the price was that the money was to be paid by means of hundis drawn by the defendants on the plaintiffs. The hundis were to be presented at Madras along with the railway receipts for the goods. In the course of their dealings, the defendants drew a hundi in their own favour for price of goods sold and indorsed it to a hundi broker in Calcutta. The hundi was eventually presented to the plaintiffs in Madras and paid off. The plaintiffs then sued the defendants at Madras for recovery of a sum of money alleged to have been overpaid by means of the hundi. On a question arising as to whether the Madras Court had jurisdiction to entertain the suit, *held,* that a part of the cause of action arose in Madras as the payment was made in Madras and that under S. 20 (*c*) of the Civil Procedure Code the suit was maintainable in the Court in which it was brought.

Where a person outside Madras draws hundis on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the drawer outside Madras but only when the payment is actually made by the firm in Madras on the hundi.

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*A. A. O. No. 75 of 1922. 20th November 1923.

Mylappa Chettiar v. *Aga Mirza Mohamed Shirazee,* 37 M L J 712 distinguished.

Ponnuswami Iyer and Narayanaswami Iyer. *v.* Damodar Hunsraj.

Appeal against the order of the City Civil Court of Madras, dated the 14th December, 1921 in O. S. No. 530 of 1920.

M. A. Thirunarayanachari for appellants.

N. Chandrasekara Aiyar for respondents.

The Judgment of the Court was delivered by

Krishnan, J.

Krishnan, J. :—This is an appeal against the order of the learned City Civil Judge returning the plaint in O. S. No. 530 of 1920 on his file to be presented to the proper Court. The learned Judge held that no part of the cause of action arose within his jurisdiction and therefore passed that order. The suit was brought by the receivers on behalf of a firm in Madras called Kuppuswami Naidu and Company against the defendants, a firm carrying on business in Calcutta, for a certain sum of money which they claimed, had been overpaid to the defendants' firm. Among the pleas raised by the defendants' firm one was that the Court in Madras had no jurisdiction to try the suit and that the suit was properly triable only by the Court in Calcutta, where they carried on business and where, according to them, the whole cause of action arose.

It is not denied that the defendants do not reside, or carry on business, or work for gain in Madras but the plaintiffs rely entirely for their contention that the suit lies here on the ground that part of the cause of action arose within the jurisdiction of the Madras Court. Under S. 20 (*c*) of the Code of Civil Procedure a suit can be brought where the cause of action arises at least in part, and the question we have to decide is whether the cause of action in this suit has arisen at least in part in Madras.

Kuppuswami Naidu and Co. had dealings with the Calcutta firm and the way in which the dealings were carried on was that, on the orders of Kuppuswami Naidu and Co., the Calcutta firm was to send by rail to several places all over the presidency named by the Madras Firm (plaintiffs). The contract was made in Calcutta but the arrangement as regards payments as stated by the defendants' firm itself in their written statement was that the money was to be paid either in cash in Calcutta or by hundis drawn by defendants in Calcutta on the plaintiffs' firm in Madras. The learned City

Ponnuswami Iyer and Narayanaswami Iyer. v. Damodar Hunsraj.

Krishnan, J.

Civil Judge held that this arrangement about payment was an arrangement which was tantamount to payment in Calcutta itself but we are unable to agree with the learned Judge on the point. When a firm outside Madras draws hundis on a firm in Madras which under the contract, the Madras firm has to honour and pay when presented to them in Madras, the payment cannot be considered to be made when the hundi is negotiated by the firm outside Madras but only when the payment is actually made by the firm in Madras on the hundi. Negotiation of the hundi is only a provisional method of realising money from persons who are willing to accept the hundi for a small profit and to take the trouble of presenting the hundi to the drawee and recovering the money from him. If the hundi is dishonoured the endorsee will of course have recourse to the drawer of the hundi who had endorsed it over to him. So that the receiving of the money from an endorsee cannot be treated as payment towards the contract. The payment becomes complete only when the buyer, in this case the Madras firm, actually makes payment on that hundi, and such payment is clearly a payment made in Madras. It is true that, in the first three instances, the money was actually paid by the Madras firm through an agent of theirs in Calcutta to the defendant ; but that arrangement does not seem to have been persisted in and subsequent payments were all made by the system of the Calcutta firm drawing hundis in their own favour and endorsing them to some hundi broker and obtaining money from him, that broker taking the trouble of presenting the hundis to the Madras firm and receiving payment. It may also be mentioned that one other arrangement about the payment was that payment to be made only on the delivery of the railway receipts. These railway receipts were to be attached to the hundis and presented to Kuppuswami Naidu and Co., in Madras along with the hundis when payments of the hundis were demanded from them ; so that the presentation of the railway receipt in Madras was also a part of the performance of the contract, and was a necessary condition to be performed before money could be demanded from the Madras firm.

In these circumstances, it seems to us clear that a part of the cause of action must be held to have arisen in Madras both as regards the presentation of the railway receipts and as regards the payment on hundis ; and it would follow that the

Ponnuswami Iyer and Narayanaswami Iyer, *v.* Damodar Hunsraj.

Krishnan, J.

City Civil Court had jurisdiction to try the suit, under S. 20 (*c*) of the Civil Procedure Code.

The learned City Civil Judge has relied upon a case reported in *Mylappa Chettiar* v. *Aga Mirza Mohamed Shirazee* (1) which he thinks is a case on all fours with the present one, but there is a fundamental difference between that case and the present one which the learned Judge has overlooked. There, although payment was by hundis, the arrangement was that the hundi was to be drawn and presented to the National Bank of Mandalay along with the bill of lading taken in the name of the consignor himself ; it was to be endorsed over to the branch of the National Bank at Mandalay and handed over along with the hundi to them, they were to make payment of the amount claimed to the consignor at Mandalay. The learned Judges find as a fact in that case that the National Bank was merely acting as the agent of the Madras Bank who were themselves only the agents of the consignee at Negapatam and, when the bill of lading was endorsed over to the National Bank and received by that Bank and money was paid to meet the hundi drawn on the Bank, the transaction was complete so far as the consignor was concerned as the National Bank was found to have been acting merely as agents of the Negapatam merchant. It was on that ground that the learned Judges in that case held that the payment should be taken to be one made in Mandalay and not in Negapatam and that, so far as payment was concerned, the cause of action did not arise in Negapatam, but in Mandalay. Here, as we have already stated, all that the Calcutta firm did was to draw the hundi on the Madras firm and discount it in the manner usual among merchants with some exchange bank or firm which took hundis on discount, without being freed from the liability of having to repay the money paid in case the hundi is dishonoured. The Calcutta firm was entitled to discount the hundi with whomsoever it pleased. There is no evidence that Nantaramdas Atmaramdas, the firm which actually negotiated these hundis for the Calcutta firm, were acting as agents of the Madras merchants at all. This case is therefore very clearly distinguishable from the case in *Mylappa Chettiar* v. *Aga Mirza Mohammad Shirazee* (1).

The Bombay case referred to by the learned Judge, *Motilal* v. *Surajmal* (2) is a case where the principles are no doubt stated by Tyabji, J., but according to those principles if the pay-

1. (1919) 37 M L J 712. 2. (1904) I L R 30 B 167.

Ponnuswami Iyer and Narayanaswami Iyer. v. Damodar Hunsraj. —— Krishnan, J.

ment has to be made at a particular place, part of the cause of action will arise there.

It will be further noticed that the main claim in this suit is really for the amount that had been overpaid by Kuppusami Naidu and Co., to the defendant company. That payment was actually made in Madras. The hundi having been drawn for a larger sum than the Calcutta firm was entitled to draw it for was presented in Madras and to save it from being dishonoured the Madras firm paid the excess amount here in Madras, and it is mainly for that amount that the present suit is brought.

It is therefore clear to us that the cause of action did arise in Madras and that the plaint should not have been returned for being presented to another Court but that the learned judge should have tried the suit himself. We therefore set aside the order of the learned Judge and direct him to take the plaint on to his file and dispose of the case according to law.

As regards costs ,the respondent will pay the appellants costs in this Court. All costs in the lower Court will be disposed of by the City Civil Judge in his final judgment.

A. V. V. —————— *Appeal allowed.*

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

IN INSOLVENCY.

PRESENT :—SIR WALTER GEORGE SALIS SCHWABE K. C. *Chief Justice,* MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE KRISHNAN.

In the matter of A. N. B. Baluswami Iyer and A. N. B. Narasimha Iyer. *Insolvents.*

In the matter of Sellamuthu Servai and Rathnaswami Servai of S. Vellaswami Servai and brothers *Insolvents.*

Hindu Law—Joint family—Father—Debts of, not immoral or illegal—Son's share in family property—Liability of, during father's life-time.

F. B. —— Baluswami Iyer In the matter of

Held, that on the insolvency of a Hindu father, the Official Assignee could sell the joint ancestral estate of the insolvent and his sons to pay debts of the insolvent not tainted with illegality or immorality.

I. P. Nos. 201 of 1919 and 179 of 1921. In the insolvency jurisdiction.

M. A. Thirunarayanachariar for the petitioner.

The Advocate General (C. Madhavan Nair) for the respondent.

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*I P Nos. 201 of 1919 and 179 of 1921. 8th October, 1923.

F B.

Baluswami Iyer In the matter of

Sir Walter Schwabe, C. J.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—The petitioners are the infant sons of two brothers who traded in partnership and became insolvent. They were in possession of joint family property to shares in which the sons had on birth became entitled.

The question raised in this insolvency petition is whether the son's shares in the joint family property of a Hindu governed by the Mitakshara Law can be made liable during their fathers' lifetime to the fathers' debts other than Avyavaharika, that is, those tainted with illegality or immorality, for the fathers having become insolvent, the Official Assignee claims to have recourse to the joint family property including, if necessary, the sons' undivided shares therein. He alleges that the fathers could themselves alienate the property and pay such debts and that he can exercise that right in the interests of the faher's creditors.

There can be no doubt that this has been supposed to be in accordance with the Hindu Law for a very long time past and that Indian Courts have acted upon this view so regularly and continuously that it has been accepted as a well-known principle of law, and that a very large number of titles to property, where there had been sales of joint property by a father's creditors, or by the Official Assignee on his insolvency has been accepted as good and not in any way open to question.

We are now asked to say that all this is wrong, and that the son's obligation to pay his father's debts comes into operation only on his death and that the son's share in the joint family property is immune until such time, except when the debt was incurred by the father for the benefit of the family, that is to say, as agent acting within the scope of his authority. It is said that the principle on which the law has proceeded is that a son is under a pious obligation to pay his father's debts and so save his father's soul from the penalties which the Hindu religion recognises as falling to the lot of those who leave this world with debts unpaid, and that it having been pointed out in two recent decisions of the Privy Council that, as it cannot at any time be predicated with certainty that any one will die without himself having discharged his debts, that pious obligation cannot come into operation during the lifetime of the father, and it must follow that the son's share in the joint family property cannot during the father's lifetime in any way be made

F. B.
Baluswami Iyer In the matter of
Sir Walter Schwabe, C. J.

liable for the father's separate debts. Logical though this may be, it is by no means a convincing argument. Once a proposition of law has been established and acted upon over a period of time, it is too late to uproot it by a re-examination of the *rationes decidendi* of the cases by which the proposition was first established, and a conclusion that those *rationes* were erroneous at the time and no longer bring conviction to the existing judicial mind. Further, the principle enunciated by Lord Halsbury in *Quinn v. Leathem* (1) are particularly apposite when trying to apply the rules of logic on a re-examination of the principles of the reported decisions on Hindu Law and their application to a particular set of circumstances. He stated them thus "There are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decided. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all."

If this matter were coming before us as a case of first impression and without the large mass of authority with which it is surrounded, I should enquire by an examination of the original texts of the Smrithis and Mitakshara and the commentaries thereon whether it appeared that son's property was or was not liable for his father's debts during the father's lifetime. If I found that the answer to this question depended on pious obligation I should wish to be satisfied whether that pious obligation was such that it only comes into operation on the father's death. On general principles a son's property cannot be taken to pay his father's debts and it would be necessary to show first that the Mitakshara makes some exception on account of which that general principle does not apply to Hindus, and then to discover how far that exception extends. I should on that enquiry soon come to a passage in Yagnavalkya which has been

1. (1901) A C 495, 506.

F.-B.

Baluswami Iyer In the matter of

Sir Walter Schwabe, C. J.

rendered, "If a father has gone abroad or is dead or is subdued by calamity, his debts shall be paid by his sons and grandsons." Based on that passage the author of the Mitakshara lays down, "If a father without paying the debt which is due dies, or goes to a different country, or is afflicted with an incurable disease and the like, then his debt must be paid by his sons and grandsons by reason of their sonship and grandsonship even if no assets of the father or the grandfather have been left," and later to a statement in Jagannatha which explains passages in Vishnu and Yajnavalkya which include the case of a father being wholly immersed in vice, as referring to a state of 'combined insolvency and insolence.' The matter for consideration would be whether such expressions must not be taken to include a case of declared insolvency which view, if accepted, would be sufficient to determine the present case. But I think we are relieved from the burden of this enquiry because certain principles have been too long established for this Court, at any rate, to question them. In 1886 in *Nanomi Babuasin* v. *Modun Mohun* (2), Lord Hobhouse who delivered the opinion of the Board said, 'Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against his creditor's remedies for their debts, if not tainted with immorality. On this important question of the liability of the joint estate their Lordships think that there is now no conflict of authority." In 1916 in *Sripat singh* v *Tagore* (3) Lord Buckmaster said, "In every other event," that is, except where the debt was incurred for illegal or immoral purposes, "It is open to the execution-creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." Between those dates the principle has been acted upon by the Privy Council and all the Courts of India. It is true that in all the cases of the Privy Council the question arose as between the alienees of the family property and the sons or their representatives, but I can find no indication that those cases were decided as has been suggested here, on the consideration of the rights of the alienees as *bona fide* purchasers for value without notice. Indian Courts have not understood those cases as being limited in that way, for they have applied the principle to cases of execution against the son's share in the family property and to the rights of Official As-

2. (1885) L R 13 I A 1 13 C 21, 35.

3. (1916) L R 44 I A 1 : 32 M L J 133 44 C 524 (P C).

F. B.

Baluswami Iyer In the matter of

Sir Walter Schwabe, C. J.

signee on the father's insolvency and even to determining the forms of decree in suits against the father when it is desired to make the son's share answerable for the decree.

In 1917 came the decision in *Sahuram Chander* v. *Bhup Singh* (4). This case actually decided that the rule already established, that an alienation by the father of family property can only bind the son's interest in that property when the alienation was for the purpose of discharging an antecedent debt, must be limited in its application to cases where the antecedent debt was incurred wholly apart from security of the joint family property. But their Lordships did state their view that the pious duty of a son to discharge his father's debts only arose on his father's death. It is to be observed that in that case the claim against father for repayment of the money due was long since barred by limitation, and that Board was, therefore not considering the question whether if a decree had been obtained in respect of that debt or the father had become insolvent, it was a debt for which the son's share in the family property could have been made liable. Further, in recognising the principle that the father can alienate joint family property to secure payment of an antecedent debt, it would seem that the Board must have recognised that the son's share can be made in the father's lifetime liable to pay his father's debts although such debts were not incurred for the benefit of the family. Indeed, in my view, this case is really an authority in favour of the Official Assignee who is dealing with antecedent debts, for if the father can alienate the family property to pay those debts, it seems to follow that the Official Assignee standing in his shoes can do the same. Based, however, on the statement in this case that the pious obligation only arises on the death of the father attempts were made all over India to raise once more the question which it was thought had been set at rest by *Nanomi Babuasin* v. *Madan Mohun* (2) and to get a finding that in no case where the debt was not incurred on behalf of the family could the son's share be reached during the father's lifetime. These attempts failed see, for instance, *Peda Venkanna* v. *Srinivasa Deekshathulu* (5), *Kandaswami Gowndan* v. *Kuppu Moopan* (6), *Subramania Iyer* v. *Shaw Wallace and Co., Madras* (7) and *Hanumat Kashinath* v. *Ganesh Annaji* (8). *Sahuram's case* was followed by the Privy

4. (1917) L R 44 I A 126 : 33 M L J 14 (P C).
2. (1886) I L R 13 Cal 21 (P C).
5. (1917) I L R 41 M 136 33 M L J 519.
6. (1919) I L R 43 M 421 : 38 M L J 203. 7. (1919) 38 M L J 402.
8. (1918) I L R 43 Bom 612.

F. B.
Baluswami Iyer In the matter of Sir Walter, Schwabe, C .J

Council in *Jogi Das* v. *Ganga Ram* (9) where Lord Haldane quoted it as authority for the proposition that the mere circumstance of a pious obligation did not validate the mortgage otherwise invalid. In 1922 in *Chetram* v| *Ram Singh* (10), it was held following *Sahuram's case* that the mortgage of the family property not being for an antecedent debt the mortgage and the subsequent sale of the equity of redemption did not bind the sons or grandsons' shares in the family property and it was further held that the grandsons were not under a pious obligation to repay to the vendees of the equity as a condition of recovering the property the money received by their grandfather. Lord Shaw in delivering the opinion of the Board quoted with approval Lord Haldane's interpretation of his, Lord Shaw's judgment in *Sahuram's case* but he added : " In the present case the doctrine " (that is, of pious obligation) ' is invoked aginst grandsons and in the lifetime of sons. Nothing more need be said. The invocation of the doctrine entirely fails. ' Based on this observation attempts once more have been made in all the Indian Courts to throw doubt on the principle established in *Nanomi's case* and I think opportunely re-stated in *Sripat Singh* v. *Tagore* (3) by Lord Buckmaster. In Calcutta and Madras this has failed, see *Madhusudan Das Mohant* v. *Iswara Dayi* (11). *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12) and *Sama Rao* v. *Vannaji Vapujee* (13).

By reason of the numerous cases pending in insolvency and otherwise, this petition has been referred to a Bench, and I have directed it to be heard by this Court as at present constituted. In my judgment, the *cases of Sahuram* and *Chetram* were not intended to and did not alter the law as laid down in a long series of cases referred to above, and the Official Assignee is entitled to succeed on this petition. On this point until the Privy Council has definitely otherwise decreed, the law in this Presidency must be considered to remain unaltered in this respect.

Since the argument in this case, a judgment of the Allahabad High Court in *Kishen Singh* v *Chhajju Singh* (14) has been published. In that case in a suit against a father and sons in respect of rent due under a large lease to the father it was held that the lease was not taken for the benefit of the family, and was a speculative and risky transaction not binding on the

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3. (1916) L R 44 I A 1 32 M L J 133 : 44 C 524 (P C).
9. (1917) 21 C W. N. 957 (P. C.) 10. (1922) 49 I A 228 : 43 M L J 98 (P C)
11. (1921) I L R 48 C 341. 12. (1922) I L R 46 M 54 : 43 M L J 569.
13. (1922) I L R 46 M 64 : 43 M L J 745. 14. (1922) I L R 45 A 90.

F. B.
Baluswami Iyer In the matter of
Sir Walter, Schwabe, C J.

family, and the sons were accordingly dismissed from the suit and a decree was given against the father alone, and in execution of that decree certain family property which had been hypothecated by the father as securityfor payment of the rent due under the lease, was attached and the son's interest therein was sought to be brought to sale in satisfaction of the decree. It was held that this could not be allowed and, in my judgment, this decision is right in that the debt having been held as Avyavaharika, execution could not be allowed against the sons in any form it being a debt for which they had expressly been found to be not liable and for which their property could not be made liable. But as I read the judgment, it goes much further and indeed seems to accept as correct practically all the arguments which had been so clearly and ably addressed to us in this case by Mr. Tirunarayana Chari. It seems to lay down definitely that the pious obligation of a Hindu son to pay his father's debt does not arise until after the death of the father and it treats the *cases of Sahuram and Chetram* as being authorities for this proposition and speaks of cases such as *Girdhari Lal Kanto Lal* (15) and cases following *Nanomi's case* as having their authority shaken by these later Privy Council decisions, and with those parts of the judgment for the reasons given above I do not agree. Where a suit having been brought on a mortgage by the father of family property in which his sons are joined as parties, it is held that the sons' shares in the family property could nevertheless be taken in execution of the decree against the father is a point on which it is not necessary to express an opinion and I should not desire to do so without having the matter fully argued. It would no doubt be a curious and anomalous position if the sons' shares were not bound by the mortgage, but were liable to be taken in execution for the mortgage debt. But that is not a question which we are called upon to decide.

I. P. No. 179 of 1921.—The petition will be referred back to insolvency Judge with these directions. He will deal with the costs.

I. P. No. 201 of 1919 is referred back to the Insolvency Judge for disposal as we have not sufficient facts before us to deal with it.

Coutts Trotter, J

Coutts-Trotter, J. :—In the year 1917, the case of *Sahuram Chandra* v. *Bhup Singh* (4), was decided by the Privy

15. (1875) L R 1 I A 321. 4. (1917) L R 44 I A 126.

F. B.

Baluswami Iyer In the matter of v. Coutts Trotter, J.

Council. I set out the head-note as it appears at page 126 of 44 I. A. as clearly showing the propositions which the learned reporter conceived that case to establish. 'The father of a joint Hindu family governed by the Mitakshara can only sell or mortgage the joint family property so as to bind his sons in two cases, namely (1) where the alienation is for family necessity, (2) where the alienation is made to discharge a debt which (*a*) was antecedent to the alienation, (*b*) was incurred wholly apart from the security of the joint family property and (*c*) is not proved to have been incurred for immoral purposes. Further during the father's life an alienation by him is effective only in the first case, since its validity in the second case rests upon the pious duty of the sons to discharge their father's debt, and that duty arises only 'upon his death.' As to the first main proposition there has never been any question, nor as to the proposition (2) (*c*). As regards the proposition (2) (*a*) their Lordships refer to the conflict of authority which existed in India as to whether money paid in consideration of a mortgage of ancestral property effected by the father could be treated as being antecedent within the meaning of the rules and they hold that it could not and that the debt must not only be antecedent in time, but must be a dissociated and distinct transaction. The proposition (2) (*b*) may or may not have been new law when it was promulgated. But it is safe to say that it embodied a principle which was not present to the mind of the Indian Courts and had not been applied by them. A Full Bench of five Judges of this Court in *Arumugam Chetty* v. *Muthu Gounden* (16), was so much impressed with the possible effect of the application of this principle upon existing titles that they treated that proposition as an *obiter dictum* and upheld a mortgage where the antecedent debt relied upon was a prior mortgage of the joint family estate independent in fact and prior in time to the mortgage sued upon. The decision of the Board in *Chetram* v. *Ram Singh* (10) re-affirmed the proposition and although they do not expressly overrule the decision of the Madras Full Bench, it was cited to them by Mr. De Gruyther in argument, and I cannot doubt that they must be taken to have disapproved it. But we are really concerned in this case with the last proposition, namely, that the pious obligation, as it is commonly called of the sons to discharge their father's debts, which the

16. (1919) I L R 42 M 711 : 37 M L J 166 (F B).

10. (1922) L R 49 I A 228 : 43 M L J 98 (P C).

F. B

Baluswami Iyer In the matter of

Coutts Trotter, J.

Hindu Law undoubtedly imposes upon them and grandsons, does not arise till the death of the father.

The difficulty which we are called upon to solve arises in this way. The Official Assignee seeks to alienate the joint family property of the family of which the insolvents were the managers including the assets of the minor sons in satisfaction of the debts of the insolvents so far as they are neither immoral nor illegal within the meaning of the rule. The minor sons seek by this motion to restrain him from doing so. It was decided by a Bench of this Court consisting of two members of the present Bench in *The Official Assignee of Madras* v. *Ramachandra Aiyar* (12), that the Official Assignee, though it cannot be said that the shares of the minors actually vest in him, has nevertheless the same rights of disposition of the family property in satisfaction of the debts of the manager as the manager would himself have been entitled to exercise if he had not been adjudicated an insolvent. I think that we should follow that decision which was only a re-statement of the effect of a long series of decisions in India beginning with the well known judgment of Latham, J. in *Fakirchand Motichand* v. *Motichand Harruckchand* (17). Indeed I do not gather that the correctness of that decision was challenged in the lucid and able argument of Mr. Tirunarayanachari. His contention really is that on the true view of the authorities the father himself would not in the circumstances have the right to alienate these properties. There can be no doubt that a series of decisions of the Privy Council has established that a sale of the family property by the father to his creditor or in execution levied by the father's creditor on the family property cannot be set aside by the sons. That has been interpreted by the High Courts of India to involve the further proposition that the sons are not only bound by the completed sale or execution proceedings when the property purports to have passed to the creditor, but cannot resist the steps taken by the creditor to bring about the transfer of the ownership of the property himself. The cases are set out in note (1) at page 410, section 307, of the 9th Edition of Mayne on Hindu Law. Mr. Tirunarayanachari's argument falls mainly under two heads (1) he contends that all these decisions whether of the Privy Council or of the Indian Courts are based on the supposition that the pious obligation devolves upon the sons not only upon

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12. (1922) I L R 46 M 54 : 43 M L J 569. 17. I L R 7 B 438.

F. B.

Baluswami Iyer, In the matter of

Coutts Trotter, J.

the death but during the lifetime of the father. It is only just to observe that the leading case of *Girdhari Lal* v. *Kantoo Lal* (15), undoubtedly appears to proceed on that footing. He conteinds that as the pious obligation has been authoritatively denied by the latest Privy Council decisions to exist during the father's lifetime, these cases are no longer to be regarded as binding where the father is alive. (2) He argues that even if the older decisions of the Privy Council which are set out at page 410 of Mayne on Hindu Law are binding, they are all cases where the property by alienation or execution had already come into the hands of the creditor and that the liability of the sons should be confined to such cases. Hs supports this by saying that *Sahuram's case* (4), has given a new ground on which the liability of the sons can be supported in cases of a completed transfer and excluded in cases where the transfer is not yet completed. He has been at a little difficulty to find a proper legal label for his position, speaking sometimes of an equity and sometimes of a doctrine in the nature of estoppel. However, let us turn to the passages in the judgment of the Board in *Sahu Ram's case* (4), on which he relies. At page 132 the Board say this "They desire in the first place to make it clear that much if not all of the law on the subject has arisen from the necessity of protecting the rights of third persons, say, the purchasers of the property who have taken their title for onerous consideration and in good faith," and at page 133 is the following passage : "A perusal of the numerous authorities will show that where a joint family property has been sold out and out or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, these rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head." Their Lordships then refer to the well known summary of Sir James Colville in *Suraj Bunsi Koer* v. *Sheo Pershad Singh* (18), which begins with the words, "where joint ancestral property has passed out of a joint family," words repeated by Sir John Stanley, C. J. in the case of *Chandradeo Singh* v. *Mata Prasad* (19). So far as I can ascertain, it is the fact that all the Privy Council cases do deal with executed sales and not with mere proceedings to enforce

15. (1875) L. R. 1 I. A. 321.

4. (1917) L R 44 I A 126.

18. (1882) L R 6 I A 88.

19. (1909) I L R 31 All 176 (F B).

F. B.
Balaswami Iyer
In the matter of
Coutts' Trotter J

the creditor's rights. But it is difficult to see in principle what reason there can be for holding that such a distinction should be drawn. If a creditor can hold what he has got, it is difficult to see why his hand should be stayed in attempting to get it.

The argument that because the decision in *Sahuram's case* (4), has removed the basis which underlies the earlier decisions of the Privy Council beginning with *Girdhari Lal's case* (15), therefore the decisions themselves are to be disregarded, is one that I confess does not appeal to me strongly. The last thing I look for in Hindu Law is logical consistency, compounded as that law is, of ancient texts, thousands of years old, qualified and interpreted by a series of commentaries and by decisions of the Indian Courts and the Privy Council to temper and modify their application to the conditions of modern Indian life. It seems logically unanswerable to say that as the pious obligation of the son is based on the duty to remove his father from hell, that obligation cannot arise until the father by means of his death has reached hell. But the matter is not so simple as that, for Vishnu and Yajnavalkya as cited by Jagannatha both accept the father's becoming a sanyasi or being wholly immersed in vice or his suffering from incurable disease or being mad or being extremely aged (these last three qualifications come from Katyayana and Vrihaspati), as also giving rise to the son's liability to pay his father's debts. It it possible enough to say that the early authorities treat these conditions as equivalent to physical death, but at any rate the doctrine of actual residence in *put* is gone, and it may be that that is the solution of this difficulty namely, that one is entitled to treat insolvency, as equivalent to a kind of civil death of the father which would thereby invoke the pious obligation of the sons. It is worth remarking that Jagannatha in his comment on the phrase "immersed in vice" includes under that head a state of insolvency and insolence in which the father has abandoned all attempt to satisfy his creditors. He does not of course use 'insolvency' in the technical sense of a person who has been actually adjudicated by a Court of Law. If this enunciation of the Hindu Law is correct, it seems to me that it will apply *a fortiori* to a case where there had been such a formal adjudication.

The next observation I have to make is that there are at least two decisions of the Privy Council in which the son's lia-

4. (1917) L R 44 I A 126. 15. (1875) L. R. 1 I A 321.

bility was enforced during the lifetime of the father, although it is true that it was after the property had passed to the creditor. One was *Nanomi Babuasin* v. *Modun Mohun* (2), and the other was *Sripat Singh* v. *Tagore* (3). In each of these cases language was used which appears to imply that their Lordships who decided it had no intention of restricting the son's obligations to cases where property has actually passed. And in each case the decision contains statements which if they are correct law establish the liability of the sons in such a case as the present. In *Nanomi Babuasin* v. *Modun Mohun* (2) Lord Hobhouse says this at page 35 "Destructive as it may be of the principle of independent co-parcenary rights in the sons, the decisions have for sometime established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt or against his creditors' remedies for their debts if not tainted wih immorality." In *Sripat Singh* v. *Tagore* (3), Lord Buckmaster says this at page 4, "in every other event" (that is, except where the debt was incurred for illegal or immoral purposes), "it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtained against the father alone." It seems to me impossible to hold that these pronouncements mean that the creditor can hold the property against the sons if he has actually got it, but can be resisted in his attempts to take the legal steps necessary to get it. I have already said that I do not look for logic in Hindu Law, but I think that such a state of things is repugnant not merely to logic but to a sense of practical justice and convenience. I think that the matter is admirably put by Shah, J. in *Hanumanth Kashinath* v. *Ganesh Annaji* (8), "I am, therefore, of opinion that in the absence of a definite and explicit pronouncement on the point, this Court is bound in spite of the observations in *Sahuram's case* (4) to follow the Indian decisions and the decisions of the Privy Council to which I have referred, and to hold that the decree-holder's right to proceed against the ancestral immoveable property in execution during the debtor's lifetime is co-extensive with the debtor's power to alienate it under the Mitakshara for the satisfaction of his antecedent debts not tainted with illegality or immorality." Since the argument was concluded, our attention has been drawn to the case of *Kishan Singh* v. *Chhaju*

2. (1885) I L R 13 C 21 (P C). 3. (1916) L R 44 I A 1 : 32 M L J 133 (P C).
4. (1917) L R 44 I A 126 33 M L J 14 (P C). 8. (1919) I L R 43 B 612, 629

Paluswami Iyer In the matter of

Coutts Trotter, J.

Singh (14), and it is indisputable that the reasoning on which the judgment in that case proceeds is opposed to the conclusion and reasoning of Scott, C. J. and Shah, J. in *Hanumanth Kashinath* v. *Ganesh Annaji*(8) and in effect adopts the line of argument taken by Mr. Tirunarayanachari in this case before us. The actual decision can be distinguished on a very simple ground The decree was passed in a suit in which the sons and grandsons had been made parties and the Court which passed the decree expressly exempted them and gave judgment against the father only. It was then sought notwithstanding the decree to bind the sons' and grandson's shares in execution, the decree not having been appealed from. I conceive that the decision can be upheld on the ground that even supposing the decree to be wrong, as long as it stood execution could not be sought on the footing that it was to be treated as a nullity in so far as it exonerated the sons and grandsons.

I respectfully agree with the High Court of Bombay that the only course open to a Court in this country is to follow the earlier decisions and hold that the father manager or the creditor or the Official Assignee standing in his shoes has the power to alienate joint family property in satisfaction of an antecedent debt of the father manager not tainted with illegality or immorality. If the Privy Council had thought that the earlier decisions of the Board and the mass of decisions of the Indian Courts which had been built upon them were erroneous or were to be restricted in the manner suggested in *Kishen* v. *Chhaju Singh* (14), they could easily have said so, as the whole subject has been before them for review in *Sahuram's case* and *Chetram's case*. They would then have pointed out that the dicta of Lord Hobhouse and Lord Buckmaster in *Nanomi Babuasin's case* and *Sripat Singh's case* respectively which entirely support the decisions in the Indian Courts down to *Sahuram's case*, travelled outside their legitimate scope in the decisions involved. They have not done so and until we are given further guidance I think that our plain duty is to take it as a settled rule that the father during his lifetime and any one who during his lifetime stands in his shoes can validly alienate the whole of the joint family property in satisfaction of antecedent debts not tainted with illegality or immorality, and that it would be travelling outside our legitimate function to consider

14 (1922) I. L. R. 45 All. 490. 8. (1919) I. L. R 43 B 612.

F. B.

Baluswami Iyer, In the matter of

Coutts Trotter J.

a rule so well established as abrogated because the supposed basis on which it rests has been disturbed by the more recent pronouncements of the Privy Council.

Since I wrote this judgment and submitted it to my Lord the Chief Justice, I have had the advantage of perusing his judgment, and I desire to say that I respectfully agree with his observations on the case of *Kishen Singh* v *Chhajju Singh* (14).

Krishnan, J.

Krishnan, J. :—In this case the question for our decision is whether the Official Assignee is entitled to sell the whole of the joint ancestral estate of an insolvent Hindu father including the shares of his sons the parties being governed by the Mitakshara Law, in realising the assets of the insolvent for distribution among the creditors. It is not disputed that if the father has the right to sell the whole joint estate to pay off his antecedent debts that power can be exercised by the Official Assignee. This was so decided recently by this Court in *Official Assignee of Madras* v. *Ramachandra Aiyar* (12). The question for our consideration then narrows itself into whether a Hindu father is entitled to alienate the joint ancestral estate of himself and his sons to pay off an antecedent debt of his. As pointed out by the learned Chief Justice, it has been taken as the settled law in this country that he could do so provided that the debt was not an illegal or immoral one, ever since the decisions of the Privy Council in *Girdhari Lal's case* and in *Nanomi Babuasin's case,* the latest ruling of the Privy Council on the point being in *Sripat Singh* v. *Tagore* (3). Now it is contended before us that the recent decisions of the Privy Council in *Sahuram's case,* followed in *Chetram's case* have altered the law on the point and has abrogated the doctrine of the Hindu father's right to alienate the joint ancestral property of himself and of his sons to pay off a proper antecedent debt of his.

To decide this question we have to consider the *cases of Sahuram* and of *Chetram* very carefully. Taking *Sahuram's case* first, that was a suit brought to enforce a mortgage given about 20 years prior to suit by one Bhup Singh to one Bhagirath for Rs. 200 paid in cash. Sahuram the plaintiff obtained the rights under that mortgage by paying off Bhagirath's mortgage and sued Bhup Singh and his sons and grandsons and others to recover Rs. 15,000 by sale of the property mortgaged which consisted of joint ancestral properties belonging to Bhup Singh

14. (1922) I L R 45 All 90.

12. (1912) I L R 46 M 54. 3. (1916) L R 44 I A 1.

F B.
Baluswami Iyer In the matter of
Krishnan, J

and his sons and grandsons. It was found by the Lower Court that no legal necessity for the mortgage had been proved. Before the Privy Council it was argued however that even though legal necessity was not proved as there was no proof by the sons that the debt was of an illegal or immoral character, they had no defence to the suit as the father was entitled to mortgage the ancestral estate for an antecedent debt of his, quite apart from any legal necessity. The Privy Council had to consider then the scope of the doctrine of 'antecedent debt' to see if it applied to the facts of the case and their Lordships held that a mortgage debt borrowed on the security of the ancestral property itself could not be treated in any way as an antecedent debt within the meaning of that doctrine and they accordingly repelled the argument that the case was one to which the doctrine applied. They did not however, say that the father could not sell or charge the joint ancestral estate where the debt was not only antecedently incurred by him, but incurred wholly apart from the security of the joint property. In fact if they were holding that the father could not sell the joint estate for an antecedent debt of his because the sons' pious duty arose only after the father's death they would have said so in clear terms and there would have been no necessity to consider the scope of the rule of 'antecedent debts'. On the other hand their Lordships have in more than one place in their judgment stated that they make an exception in favour of the father's power to sell for an antecedent debt. Their Lordships on p. 444 of I. L. R. 39 A 437 say this "although the correct and general principle be that the debt was not for the benefit of an estate then the manager should have no power either of mortgage or sale of that estate in order to meet such a debt yet *an exception has been made* to cover the case of mortgage or sale by the father in consideration of an antecedent debt. This being an exception from a general and sound principle their Lordships are of opinion that the exception should not be extended and should be very carefully guarded." Here they clearly recognise the existence of the rule of antecedent debts and do not in any way abrogate it as suggested. Again on page 447 their Lordships say "In their Lordship's opinion these expressions which have been the subject of so much difference of legal opinion, do not give any connivance to the idea that the joint family estate can be effectively sold or charged in such a manner as to bind the issue of the father, except where the sale or charge has been made

F B.
Baluswami Iyer In the matter of
Krishnan, J.

in order to discharge an obligation not only antecedently incurred but incurred wholly apart from the ownership of the joint estate of the security afforded or supposed to be available by such joint estate. *The exception being allowed as in the state of authorities it must be.* It appears to their Lordships to apply and to apply (only) to the case where the father's debts have been incurred irrespective of the credit obtainable from immoveable assets which do not personally belong to him, but are joint family property." I have quoted these passages at length to show that their Lordships expressly exempted from the purview of their decision the exceptional case of the father being able to alienate joint ancestral property of himself and his sons for a proper antecedent debt. How after such expressions of opinion by their Lordships themselves in their judgment the case could be treated as an authority for doing away with the doctrine of antecedent debt altogether, I entirely fail to see.

The main decision in *Sahuram's case* was that a mortgage on ancestral property could under no circumstances be treated as an antecedent debt to justify an alienation of ancestral property and that beyond the power given to the father by this doctrine to deal with the son's share in the joint estate neither the father nor his creditors could rely merely upon the general rule of the son's pious duty to pay his father's debt to have recourse to the son's share of the joint estate to pay the father's debt. These propositions were reaffirmed in *Chetram's case* and any attempt like the one made by the Full Bench of this Court in *Arumugam Chetty* v. *Muthu Goundan* (16) to treat the ruling of the Privy Council as an *obiter dictum* must be abandoned. I agree with Coutts Trotter, J., that that Full Bench decision must be treated as erroneous, for though it is not expressly overruled by the Privy Council it is clearly in conflict with their Lordship's view which has been re-affirmed in *Chetram's case.*

The passage that has given trouble in dealing with the question before us is the one on page 444 of I. L. 39 All. where their Lordships say that the prior obligation of the sons to pay off their father's debt cannot and does not arise till the death of the father. Now it is argued that the father's power to sell the ancestral estate including the shares of his sons for an antecedent debt and the creditors right to have recourse to such estate for payment of his debt are founded upon the theory of

16. (1919) I L R 42 M 711 : 37 M L J 166 (F B).

F. B.
Baluswami Iyer In the matter of
Krishnan J.

the son's pious obligation and if that pious obligation is treated as not arising during the father's lifetime the father cannot deal with the son's shares in the joint estate nor the creditor while the father is alive.

The doctrine of 'antecedent debt' was no doubt evolved from the 'pious obligation' theory, see *Nanomi's case* and that theory originally was that the son was under a duty to save his father's soul from the penalties prescribed by Hindu Sastras for a man who dies without paying off his debts. Such a duty would only arise after the father's death as the Privy Council justly point out. But the theory was extended at a very early stage even by the Hindu Smrithi writers themselves like Vishnu and Yagnavalkya to cases of persons who became sanyasis or suffered from incurable disease or went away to foreign country and so forth. These are all cases where the pious obligation was taken to arise before the death of the debtor-father. Other restrictions and changes were introduced into the doctrine by the case-law of the country till it has now become crystallised as the doctrine of the 'antecedent debt' That doctrine has become a definite and independent doctrine in Hindu Law which has been acted upon for many years and any attempt to do away with it now by referring to its origin and arguing that its development was illogical can hardly be supported. In the paragraph referred to in page 444 of I. L. R. 39 Allahabad as I read it, the Privy Council was repelling the attempt to base a claim against the sons 'merely' on account of their pious obligation to pay off their father's debt quite apart from any antecedent debt. Their Lordships use the word 'merely' in that paragraph and again lower down use the same word when they say 'accordingly the case founded merely upon pious obligation fails.' I understand their Lordships to refer in that para. the attempt to enlarge the scope of the son's liability beyond the limits of the doctrine of 'antecedent debt' by recourse to their pious duty as originally understood. Those observations, in my opinion, do not touch the doctrine of antecedent debt as otherwise the judgment will become self contradictory.

Chetram's case does not advance the position any further. It was a case of a sale by a father of ancestral estate being set aside. The mortgage which formed part of the consideration for the sale was according to their Lordship's view already expressed in *Sahuram's case* not an 'antecedent debt' The balance of the sale price was paid in cash, that of course was

Baluswamai Iyer In the matter of

Krishnan, J.

not a debt at all. The sale not being for proper legal necessity or for antecedent debts necessarily failed. It was argued that where the sale failed a debt arose, at least as regards the cash paid, which the father was bound to re-pay and that constituted an antecedent debt for which the creditor could have recourse to the ancestral estate and were it not for the fact that their Lordships were abrogating the doctrine of antecedent debts they would have given a decree for that amount against the ancestral estate. This is not so. There was no debt at all in existence to apply the doctrine of antecedent debt, the application of the doctrine of the son's pious duty by itself to make the sons liable during their father's life-time their Lordships had repudiated, see also *Jogi Das* v. *Ganga Ram* (9).

The conclusions I have come to agree with the conclusions of the Calcutta and Bombay High Court see *Madhusudhan Das Mohunt* v. *Iswari Dasi Debi* (11) and *Hanumanth Keshinath* v. *Ganesh Annaji* (8) and are in accordance with the previous rulings of this Court, cited by the learned Chief Justice in his judgment. Our attention was, however, drawn to a recent case in the Allahabad Court *Kishen Singh* v *Chhajju Singh* (14) which is in petitioner's favour. In that case it was decided at the trial of the suit itself that the sons and grandsons who were parties to the litigation and their estate were not liable for the suit debt. The question could then hardly be re-opened in execution. I therefore agree with the learned Chief Justice that the decision is right, but in so far as the views of the learned Judges are against the views I have expressed above I regret with all respect I am unable to follow them.

I have come to the conclusion that the Official Assignee can sell the joint ancestral estate of the insolvent and his sons to pay such of the debts of the insolvent which are not shown by the sons to be illegal or immoral debts, and I agree to the order proposed by the learned Chief Justice.

A. S. V.

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8. (1919) I L R 43 B 612
9. (1916) 21 C. W. N. 957 (P. C.)
14. (1922) I. L. R. 45 All. 90.
11. (1922) I. L R 48 C 341.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., KT., *Chief Justice*, MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Rajagopala Aiyar, minor, by guardian Ramachandra Aiyar *Appellant* (Petitioner-3rd defendant)*.

v.

Ramanujachariar and another *Respondents (Counter-petitioners—purchasers and decree-holder)*.

Rajagopala Aiyar *v.* Ramanuja-Chariar.

Civil Procedure Code S. 47, O. 21 rr. 22 and 90—Indian Limitation Act. Arts. 166 and 181—Execuiton sale without notice under O. 21 r. 22 where such notice is necessary —Sale, void and not merely voidable —Application to set aside a void execution sale, governed by article 181 of the Limitation Act and not by article 166—Failure to give notice under O. 21 r. 22, whether an irregularity in publishing or conducting the sale within the meaning of O. 21 r. 90.

In cases where notice under O. 21 r. 22 of the Code of Civil Procedure has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, sales held in execution are void and not merely voidable as against the persons to whom notice should have been, but was not issued.

Visvanathan Chetty v. *Somasundaram Chetty,* I L R 45 M. 875 and *Doraiswami* v. *Chidambram Pillai,* 45 M L J 413 overruled.

Raghunath Das v. *Sundar Das Khetri,* 42 Cal 72 and *Shyam Mandal* v. *Satinath Banerjee,* I L R 44 C 954 followed.

Malkarjun v. *Narhari* I. L. R. 25 B 337 and 14 C. 18 distinguished.

Where a sale in execution is void as against a party, an application to set it aside under S. 47 of the Civil Procedure Code or otherwise is governed by article 181 of the Limitation Act and not by Article 166.

Seshagiri Rao v. *Srinivasa Rao,* I L R 43 M 313 approved.

Per the Chief Justice and Waller, J :—The failure to give notice of an application for leave to attach and sell under O. 21 r. 22 of the Civil Procedure Code is not an irregularity in publishing or conducting the sale within the meaning of O. 21 r. 90 of the Code.

Appeal against the Order of the District Court of East Tanjore atNegapatam, dated the 23rd of January, 1922, in C. M. A. No. 81 of 1921, preferred against the order of the Court of the Subordinate Judge of East Tanjore at Negapatam in Miscellaneous Application No. 278 of 1921 in O. S. No. 13 of 1916 on the file of the Court of the Temporary Subordinate Judge, Tanjore.

V Ramaswami Ayyar for the appellant.

T. Narasimha Ayyangar and *N. S. Rangaswami Ayyangar* for 1st respondent.

A. A. A. O. No. 45 of 1922. 6th November 1923.

F. B.
Rajagopala Aiyar
v.
Ramanuja Chariar.
Sir Walter Schwabe, C. J.

The Court made the following

ORDER :—*The Chief Justice* :—A preliminary point is taken that no second appeal lies because it is said that this is an appeal on a petition based on, there being a material irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90, that the order made under R. 92 setting aside the sale, was an order made by reason of that material irregularity or fraud, and that as no second appeal lies from orders made under R. 92, there can be no second appeal here. The answer is that it may be perfectly true as regards part of the appeal, but one of the grounds on which the appellant relies is that no notice was given of the application for attachment and order for the sale of the property and that, that comes under S. 47 of the Civil Procedure Code and is therefore appealable as a decree.

The only direct authority on the point is the judgment of Oldfield and Seshagiri Ayyar, JJ. in *Neelu Neithiar* v. *Subramania Moothan* (1), where under somewhat similar circumstances which were not really so strong as this, because the failure to give notice was at a later stage, they held that, where an application is made which is partly covered by R. 90 of O. 21 and partly not so covered, although the order purports to have been made under R. 92 of O. 21 a second appeal will lie.

There are dicta in other cases to the effect that, where there is absence of notice, there is a remedy under O. 21. Rule 90 or S. 311 of the Old Civil Procedure Code which corresponds with it, particularly in the decision of the Privy Council in *Malkarjun* v. *Narhari* (2), but, on looking carefully into that case, we note that this point was in no way before the Privy Council ; but apart, I think that the decision in *Neelu Neithiar* v. *Subramania Moothan* (1) is an authority, and I should myself come to the same conclusion as was come to, in that case because looking at the words of O. 21, R. 90 thev appear to me perfectly plain. What is being dealt with there is a material irregularity or fraud in publishing or conducting a sale ; and I cannot bring my mind to the view that the failure to give notice of the application for leave to attach and sell is an irregularity in publishing or conducting the sale. It seems to me that it is really a contradiction in terms. There is no sale to publish or conduct until after leave of the Court has been obtained (*a*) to attach the property and (*b*) to sell.

1. (1919) 11 L. W. 59 2. (1901) I. L. R. 25 B 337.

F. B.

Rajagopala Aiyar v. Ramanuja-Chariar.

Sir Walter Schwabe, C. J.

Whether or not that failure to give notice is an illegality, is a matter which is entirely irrelevant for the present purpose because it is only certain kinds of irregularities that are covered by O. 21, R. 90. If the omission in this case was the other kind of irregularity or whether it renders wholesale a nullity, it is not brought within the wording of that rule. The preliminary point fails and this appeal must proceed.

Waller, J

Waller, J. :—I agree that a second appeal will lie.

This Appeal against Appellate Order No. 45 of 1922 came on for hearing again on Monday, Tuesday, the 24th and 25th days of September, 1923.

V Ramaswami Ayyar for the appellant.

T. Narasimha Ayyangar and *N. S. Rangaswami Ayyangar* for the 1st respondent.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH :—

ORDER :—The question in this case is as to the validity of a sale held in execution of a decree for maintenance. Appellant was the 3rd defendant in the suit. The contesting respondent is the purchaser in execution. The Sub-Judge found that the sale was invalid as notice of execution under O. 21, R. 22 had not been issued to 3rd defendant and that the application was in time under Art. 181 of the Limitation Act. Finding, further, that the property had been sold for considerably less than its proper value, he proceeded to set aside the sale under O. 21, R. 90. The District Judge, on the other hand, was of opinion that notice to 3rd defendant was unnecessary, that the sale was not invalid and that the application was barred by limitation, presumably under Art. 166 of the Limitation Act. He added that there was no allegation of fraud or collusion against 1st defendant. Had he said that no fraud or collusion had been proved, he would have been more accurate. There were certainly allegations—no doubt, of a vague description of fraud and collusion against 1st defendant and the plaintiffs in the suit. Nothing, however, was alleged against the auction-purchaser, though it is now suggested that he was a party to the fraud, as a result of which the property was sold for less than its proper value. There is no evidence of any collusion between these persons.

F. B
Rajagopala Aiyar v. Ramanuja Chariar.
Waller, J

The auction-purchaser is not connected with 1st defendant's family. It is not at all probable that the plaintiff and 1st defendant, who were on opposite sides in the suit, would have colluded together. Plaintiff had no interest whatever in getting the land sold for a low price. Her interest, if she had any, lay in the opposite direction. Nor is it apparent why 1st defendant should have conspired to bring to sale only that part of the property in which she had a life-estate.

The evidence as to the alleged inadequacy of price is not very satisfactory but we accept the finding of the Subordinate Judge that the sale was in fact at an undervalue.

II. The finding that there was no fraud or collusion does not end the matter. The next question is whether the sale, as against 3rd defendant's interest, is invalid or not. 3rd defendant had undoubtedly a vested interest in the property sold and a notice should have gone to him under O. 21, R. 22. It has been held in *Gopal Chander* v. *Gunamoni Dasi* (3) that the omission to give such a notice render the sale void. This decision has been approved by the Privy Council in *Raghunath Das* v. *Sundar Das Khetri* (4) and followed in *Shyam Mandal* v. *Satinath Banerjee* (5). The last case has been dissented from in *Visvanathan Chetty* v. *Somasundaram Chetty* (6), where it has been decided that the non-issue of notice under O. 21, R. 22, is a mere irregularity and not an illegality affecting the jurisdiction of the Court to execute the decree. The Judges refused to follow the Privy Council ruling on the ground that it was passed under the old Civil Procedure Code which had in it no provision corresponding with the present sub-rule (2) of R. 22. The ruling in *Shyam Mandal* v. *Satinath Banerjee* (5), they dismissed with the remark that it had not considered the effect of sub-rule (2). In *Doraiswami* v. *Chidambaram Pillai* (7), Spencer, J. arrived at the same conclusion. " So long " he said " as R. 22, cl. (2) permits an executing Court to dispense with notice for reasons to be recorded, it is difficult to see how the issue of process without notice and without recording reasons would affect the jurisdiction of the Court or would be more than an irregularity. " We think that the decision in *Shyam Mandal* v. *Satinath Banerjee* (5) is correct and that the ruling in *Visvanathan Chetty* v. *Somasundaram Chetty* (6) has been too widely expressed. It

3. (1892) I. L. R. 20 C. 372. 4. (1914) I L R 42 C 72 : 27 M L J 150 (P C)
5. (1917) I L R 44 C 954. 6. (1922) I L R 45 M 875 : 42 M L J 422.
7. (1923) 45 M L J 413.

F. B.

Rajagopala Aiyar v. Ramanuja-Chariar

Waller, J.

may well be that, where an application has been made under sub-rule (2) and the conditions contemplated by that sub-rule exist, the non-issue of notice without the recording of reasons would be a mere irregulariy. But we are of opinion that when, as here, it is not even suggested that the conditions required by sub-rule (1) existed or were under the consideration of the Court, the Privy Council ruling in *Raghunath Das* v. *Sundar Das Khetri* (4) should be followed. The ruling reported in *Malkarjun* v. *Narhari* (2) is not an authority to the contrary for in that case, notice was issued on a particular person under the direction of the Court but it was subsequently held that that direction was wrong and this, the Privy Council considered to be no more than an irregularity, which rendered the sale not void, but voidable. In another case, *Ram Kinkar Tiwar* v. *Sthiti Ram Punja* (8), the Privy Council decision was followed. The Code applicable to it was no doubt, that of 1882, but the opinion was clearly expressed that the law had not been altered by O. 21, R. 22 of the present Code. The ruling referred to above *Doraiswami* v. *Chidambaram Pillai* (7) expressly dissents from *Raghunathasami Ayyangar* v. *Gopala Rao* (9). In view of the conflicting opinion on the point, we think that the best course is to refer for the decision of a Full Bench the following question.

Whether, in a case where notice under O. 21, R. 22 has not been issued and the omission is due not to the fact that sub-rule (2) has been applied, but to the fact that notice was not asked for, a sale held in execution is void or merely voidable as against the person to whom notice should have been, but was not issued.

III. If the answer to the question above propounded is that the sale is void as against 3rd defendant, a further question arises—that of limitation, *i. e.*, whether the article of the Limitation Act applicable is 166 or 181 or some other and if so which article. On this point again there is a considerable divergence of opinion. In the decision reported in *Seshagiri Rao* v. *Srinivasa Rao* (10), it has been held that, when a sale is absolutely void for want of jurisdiction, the article applicable is Art. 181. The same conclusion was arrived at in *Ram*

4. (1914) I L R 42 C. 72 : 27 M L J 150. (P C.)
2. (1901) I L R 25 B 337 (P C).
8. (1917) 27 C. L. J. 528
7. (1923) 45 M. L. J. 413
9 (1921) 41 M. L. J. 547.
10. (1920) I L R 43 M 313 : 38 M L J 62.

F. B.
Rajagopala Aiyar
v.
Ramanuja-Chariar
Waller, J.

Kinker Tiwar v. *Sthithi Ram Punja* (8). Both of these decisions have been dissented from by Oldfield and Venkatasubba Rao, JJ. in *Ganapathi Mudaliar* v. *Krishnamachari* (11) (where also a sale was impugned as void), the first on the ground that the decision was supported by reference to an unreported case and not by any independent reasoning and the second on the ground that the relevant part of the Judgment was *obiter*. As to the Madras case, the ratio *decidendi*—which the Judges possibly considered too obvious to require statement—doubtless was that a void sale need not be aside. In the Calcutta Law Journal Case the decision, it is true, ultimately rested on S. 18 of the Limitation Act, but the question of the Article of Limitation applicable did arise directly in the suit and we think that the decision on it can scarcely be dismissed as *obiter*.

Another case *Balu Dos Narayan Singh* v. *Muhammad Yusuf* (12) is reported in 61 Indian Cases, but there it was held that what had occurred was a mere irregularity and that the Court had jurisdiction to sell. In other words, the decision was that the sale was voidable and not void. It was, no doubt, that Art. 166 governed all applications "on whatever grounds" to have an execution sale set aside, but that is not to say that the same article applies to cases where the sale is void and need not be set aside at all.

In a Madras case—(1922) M. W. N. p. 176—it was held that Art. 166 governed all applications, under S. 47, C. P. Code, to set aside sales on the ground either of illegality or irregularity. In another Madras case *Neelu Neithiar* v. *Subramania Moothan* (1), it was a notice under O. 21, R. 66 that was in question. The decision was that Art. 181 did not apply. There is, however, in the course of the Judgment a reference to the issue of the notice required by O. 21, R. 22 as being a condition precedent to the validity of any execution proceedings. One of the Judges was a party to the decision in *Visvanathan Chetty* v. *Somasundaram Chetty* (6).

In *Raghunathasami Ayyangar* v. *Gopala Rao* (9), the Judgment in which Oldfield, J., concurred was delivered by Ramesam, J., who laid down that where an execution sale is void, it need not be set aside. The question of limitation did not arise, but, if it had, presumably the decision would have

8. (1917) 27 C L J 528. 11. (1922) 43 M L J 184.
12. (1921) 61 I. C. 823. 1. (1919) 11 L W 59.
6. (1922) I. L. R. 45 M 875 ·42 M. L. J. 422 9. (1921) 41 M L J 547.

F. B.

Rajagopala Aiyar v. Ramanuja-Chariar.

Waller J.

been that Art. 166 did not apply. This decision was dissented from in *Doraiswami Pillai* v. *Chidambram Pillai* (7) by Spencer and Krishnan, JJ. In A. A. O. No. 74 of 1922, Spencer and Devadoss, JJ. dissented from *Seshagiri Rao* v. *Srinivasa Rao* (10) and *followed Ganapathi Mudaliar* v. *Krishnamachariar* (11). In A. A. O. No. 77 of 1921, Spencer, J., did not decide the question of limitation.

Venkatasubba Rao, J., held that the sale in question is void. He held further that the application then under consideration was, in substance, one to declare that the sale was inoperative and that therefore Art. 166 could not govern it.

I need refer to only two more Madras cases. In one of them *Muthia Chettiar* v. *Bava Sahib* (13), Oldfield and Tyabji, JJ. disagreed as to the applicability of Art. 166. Oldfield, J., was of opinion that the application, though it may have been made under S. 47, C. P. C., was essentially one to set aside a sale and was therefore barred under Art. 166. In the other *Payyidanna* v. *Lakshmi Narasamma* (14)—the question we are now considering did not arise. Sadasiva Ayyar, J., however, did refer to it. His opinion was that, if the application he was dealing with was one to set aside the sale as distinguished from one for a declaration of the invalidity of the sale as against the applicant's rights it was barred by limitation under Art. 166.

Only one other decision need be mentioned—that in *Mani Singh Mandhata* v. *Nawab Bahadur of Murshidabad* (15)—which is in favour of the view that Art. 166 governs all applications under S. 47, C. P. C. As the correctness of the decision in *Seshagiri Rao* v. *Srinivasa Rao* (10) has been doubted, we think that the question should be referred to a Full Bench for final decision. Essentially the question is this—where a sale in execution is void against a particular person, is it a necessary part of his remedy that he should ask to have the sale set aside ? If the answer is in the affirmative then probably Art. 166 applies. If on the other hand, he need not get the sale set aside, but his application can be treated as one for a declaration that the sale is void as against him, Art. 181 would seem to govern the case. The question we would refer to the Full Bench is this

7. (1923) 45 M. L J 413. 10. I L R 43 M 313.
11. (1922) 43 M L J 184 13. (1914) 27 M L J 605.
14. I L R 38 M 1076. 15. I L R 46 C 695.

F B

Rajagopala Aiyar v. Ramanuja-Chariar.

Waller, J.

Where a sale in execution is void as against a party and he applies for relief under S. 47, C. P. C., or otherwise, what is the period of limitation that governs his application ?

[The case came on for hearing on 26th October, 1923 before the Full Bench as constituted above.]

V Ramaswami Ayyar for the appellant.

K. S. Krishnaswami Ayyangar for *T. Narasimha Ayyangar* and *N. S. Rangaswami Ayyangar* for the 1st respondent and the 2nd respondent not appearing in person or by pleader.

The Court delivered the following

Sir Walter Schwabe, C J.

JUDGMENTS :—*The Chief Justice* :—If this matter were free from authority I should incline to the view that non-compliance with the provisions of O. 21, R. 22 was a material irregularity, and not an illegality which would make the subsequent sale a nullity. In England there was a rule of Common Law that judgments after the lapse of a year and a day could not be executed unless an order for what was known as a *scire facias* was first obtained. There are authorities to the effect that the disregard of that rule rendered a subsequent sale in execution voidable and not void *Blanchenay v. Bart* (16) and *Good Title* v. *Bad Title* (17), and the same rule applies in America—See Freeman on Void Judicial Sales, page 97. But in my Judgment there are authorities here to the contrary which preclude such a view being taken here. In *Gopal Chunder Chatterjee* v. *Gunamani Dasi* (3) their Lordships of the Calcutta High Court laid down that a notice under S. 248 of the Code of Civil Procedure of 1882 was necessary in order that the Court should obtain jurisdiction to sell a property by way of execution as against the legal personal representatives of the deceased judgment-debtor. In *Raghunath Das* v. *Sundar Das Khetri* (4), the judgment-debtor had become an insolvent and a sale in execuion took place without proper notice under the same section and their Lordships of the Privy Council held that the sale was a nullity. In the case before us no notice has been given of execution proceedings to the infant petitioners although a year had elapsed since the decree, but I can see no difference in principle between the position of legal representatives of a deceased judgment-debtor, or the

16. 4 Q B 707.
17. 9 Dowl. 1009.
3. (1892) I L R 20 C 370.
4. (1914) I L R 42 C 72.

F. B.

Rajagopala Aiyar v. Ramannja-Chariar

Sir Walter Schwabe. C. J.

Official Assignee of the judgment-debtor's estate, and that of a party to the suit who has not himself been served with notice of an application for execution more than a year after the decree, and is ignorant thereof. The provision for notice in the two cases of legal representatives and of parties when more than one year has elapsed are contained in the same rule, O. XXI, R. 22, which is in the same terms as S. 248 of the Civil Procedure Code of 1882, and I do not think that it is possible to hold that in one case failure to give notice is a mere irregularity while in the other it results in the Court having no jurisdiction to sell at all. In *Shyam Mandal* v. *Sitinath Banerjee* (5) Mookerjee and Cuming, JJ., held that a proper notice under O. XXI R. 22 after the lapse of one year from the decree was the very foundation of the jurisdiction itself, and that failure to give it rendered a sale inoperative even as against a stranger. It is right to point out that in that case an application was made to prevent the confirmation of the sale before it was completed and no question of limitation arose, but the grounds of the decision are quite clear and unless we disagree with them they are conclusive of this point. In *Visvanatham Chetty* v. *Somasundaram Chetty* (6) a Bench of this Court held that the non-issue of notice under O. XXI, R. 22 was a mere irregularity, and not an illegality affecting the jurisdiction of the Court to execute the decree, and in *Duraswami* v. *Chidambaram Pillai* (7) Spencer, J., took the same view ; and Krishnan, J., stated that he would have been in favour of referring the matter to a Full Bench but for the decision of the Privy Council in *Mallikarjan* v. *Narahari* (1) which he considered rendered it unnecessary to do so. The ground on which the Privy Council cases referred to above were sought to be distinguished from this case, was that O. XXI, R. 22 differed from S. 248 of the Civil Procedure Code of 1882 in that, O. XXI, R. 22 provides that the Court can issue process in execution without issuing the prescribed notice, if for reasons to be recorded, it considers that the issue of such notice would cause unreasonable delay or would defeat the ends of justice, while there was no such provision in the Code of 1882 ; and that as there is now a discretion in the Court to excuse the notice it follows that the failure to give such notice must be a mere irregularity. I am not able to follow this reasoning. I do not appreciate how the

7. (1923) 45 M L J 413. 1. (1901) I L R 25 B 337.
5. (1917) I L R 44 C 954. 6. (1922) I L R 45 M 875 42 M L J 422.

F. B.

Rajagopala Aiyar *v.* Ramanuja-chariar.

Sir Walter Schwabe, C. J.

the failure to give such notice can have any different effect under the new Code to what it had under the old Code, merely because the new Code provides that in certain cases the Court can dispense with the notice. In my judgment the only effect of this sub-section is to give the Court jurisdiction in certain cases in which without it the Court would have none. *Mallikarjan* v. *Narahari* (2) is not an authority to the contrary, for in that case notice was served on a person whom the Court had ordered to be treated as the legal representative of a deceased party and who, it was subsequently held, was not the proper legal representative, and the Privy Council held that this was a mere irregularity as the Court was acting within its jurisdiction though wrongly. *Rewa Mahton* v. *Ram Kishen Singh* (18) was relied upon as an authority against this view. In that case there were cross decrees in separate suits and execution was ordered on one of them without taking into account the other, although it was provided by S. 246 of the Code of 1877, now O. XXI, R. 18, that execution can only issue for the balance if any between the two decrees, and it was held by the Privy Council that this was an irregularity and did not render the sale void. Their Lordships held that the Court had jurisdiction to sell, and that the purchaser was no more bound to enquire into the correctness of the order for execution than into the correctness of the judgment upon which the execution was issued. This is an illustration of a case where the Court was acting within its jurisdiction on the proper interpretation of the section of the Code applicable, and does not assist in arriving at the proper interpretation of another section. It follows that the answer to the first question referred is that the sale is void.

The other question referred is what is the period of limitation that governs an application for relief where the property has been sold in execution and that sale is void. If the application is an application under the Code of Civil Procedure to set aside a sale in execution or a decree, the Article of the Limitation Act of 1908 applicable is 166 and the period of limitation is 30 days from the date of the sale. If not, the application is one for which no period of limitation is provided elsewhere and it will be governed by Article 181, the period of limitation being 3 years from the date when the right to apply accrued. Lord Davey delivering the judgment of their Lord-

2. (1901) I L R 25 B 337. 18. I L R 14 C 18,

F. B.

Rajagopala Aiyar v. Ramanuja-chariar.

Sir Walter Schwabe, C. J.

ships of the Privy Council in *Khiarajamal* v. *Daim* (19) a case where the Court had sold without jurisdiction the property of persons who were not parties to the proceeding or properly represented on the record —said " as against such persons the decrees and sales purporting to be made would be a nullity and might be disregarded without any proceeding to set them aside. If authority be desired for these elementary propositions it may be found in the judgment of Sir Barnes Peacock in *Kishen Chunder Ghose* v *Ashoorun* (20). " That is direct authority for the proposition that in such a case it is not necessary to apply to the Court to set aside the sale. If it is possible for the petitioner in this case to proceed without applying to set aside the sale he could avoid the harsh limitation imposed by Art. 166.. In my judgment he can do so. He could, but for the provisions of S. 47 of the Civil Procedure Code of 1908 bring a suit for possession of the property sold, and the purchaser would not be able to rely upon the Court sale as a defence, because that sale is a nullity and the Privy Council has held that it is not necessary to take any steps to set it aside. By reason of S. 47 all questions arising between parties to the suit relating to execution ought to be determined by the Court executing the decree, and not by a separate suit, and it has been held that the fact that a Court purchaser is a necessary party would not prevent the application of this rule. But this is only a question of procedure and the Court may treat the proceeding under this section as a suit subject to any objection as to limitation. It is unnecessary to consider whether the effect of this is that the period of limitation to be applied is the period provided by the Limitation Act in respect of applications or that provided in respect of suits. If the former, the period of limitation will be 3 years under Art. 181 and if the latter, the 12 years provided in the case of suits to recover possession of immoveable property. I cannot agree with the view that all applications under S. 47 are governed by Art. 166 nor do I think that the statements in cases to that effect are more than *obiter dicta* ; the intention being to express the view, with which I agree, that if an application is an application to set aside a sale in execution of a decree it matters not whether the application is made under S. 47 or under O. 21, R. 90. *Seshagiri Rao* v. *Srinivasa Rao* (10) is a direct authority for the proposition that when a sale is absolutely void for want of

19. (1904) I L R 32 C 296 at 312 (P C). 20. (1863) 1 Marsh 647.
10. (1920) I L R 43 43 M 313 : 38 M L J 62.

F. B.

Rajagopala Aiyar v. Ramanuja-chariar.

Sir Walter Schwabe, C. J.

jurisdiction the Article applicable is Art. 181, and in my judgment in view of the decisions of the Privy Council referred to above that case was rightly decided.

The petitioner is the guardian of infants who were properly before the Court as defendants in the original suit, and their interest in the property was liable to be sold in execution in satisfaction of the decree, and they can only be permitted to recover possession of the property on payment to the purchaser of what he has paid together with interest thereon at 6 per cent. less any amount he may have received for mesne profits, and in the absence of agreements, this petition must go back to the Court of first instance to ascertain the amount and fix the date of payment and make the necessary order for carrying out this direction. In view of the fact that the petitioner chose to frame his application under O. 21, R. 90, and to make unfounded charges of fraud against the respondent, there will be no costs here or below.

Ramesam, J.

Ramesam, J. :—The facts of the case and questions referred to the Full Bench are stated in the Order of Reference.

The first question is—whether the sale is void, no notice having been issued under O. 21, R. 22. Three possible views may be taken on the effect of want of notice under O. 21, R. 22 of the new Code.

(1) The want of notice is only an irregularity—This is the view taken by Oldfiled, J., in *Visvanathan Chetty* v. *Somasundaram Chetty* (6), and I agreed with this judgment.

(2) The sale is void—This is the decision of the Privy Council under the old Code in *Raghunath Das* v. *Sundar Das Khetri* (4), and it may be said that the addition of cl. (2) in the new Code does not make any difference when the mind of the Court was not applied to the need for notice.

(3) An intermediate view may be taken *viz.*, if the case is one to which cl. (*a*) of sub-section (1) of R. 22 applies then the want of notice is merely an irregularity; and if cl. (*b*) applies the sale is void for want of notice. In this way *Raghunath Das v. Sundar Das Khetri* (4) may be distinguished.

Now I confess there is something to be said in favour of each of these views. All that can be said in favour of (1) has been said by Oldfield, J., in *Visvanathan Chetty* v. *Somasun-*

6. (1922) I L R 45 M 875 : 42 M L J 422.
4. (1914) I L R 42 C 72 : 27 M L J 150 (P. C).

F. B.

Rajagopala Aiyar v. Ramanujachariar.

Ramesam, J.

daram Chetty (6) (with which I agreed) and by Spencer, J., in *Doraisamy* v. *Chidambaram Pillai* (7).

Incidentally I may point out that the point does not strictly arise in *Doraiswamy* v. *Chidambaram Pillai* (7). There, the sale took place on 17th January, 1916. The judgment-debtor died on 16th December, 1915. The application for attachment, for sale must have been ordered and the proclamation of sale must have been settled before his death. It does not appear that an application for execution, had to be made or was made after his death, and if there was none, it cannot be said that O. 21 R. 22, was violated. If the sale in that case was void it must be only on the ground that the judicial proceeding after the death of the judgment-debtor and without bringing any Legal representative on the record was void as held by Oldfield, J., and me in *Ragunathaswami Ayyangar* v. *Gopaul Rao* (9) but Spencer and Krishnan, JJ., dissented from this view. In the judgment of my Lord, my Lord has given reasons against adopting the reasons of the decision in *Doraiswamy* v. *Chidambaram Chetty* (9) and of Spencer, J., in *Visvanathan Chetty* v. *Somasundaram Chetty* (6).

(2) The second view was adopted in *Shyam Mandal* v. *Satinath Bannerji* (5) [dissented from by Spencer, J., in *Doraiswamy* v. *Chidambram Pillai* (7)] is supported by the Judgment of the Privy Council in *Raghunath Doss* v. *Sundar Das Khetri* (4) and now my Lord the Chief Justice. I understand that my brother Waller, J., also agrees with this view.

(3) The third view was urged before Oldfield, J., and myself and was rejected by us in *Visvanathan Chetty* v. *Somasundaram Chetty* (6). As my Lord now points out there is something to be said in its favour, but the language of the Judicial Committee which does not make any distinction between cl. (*a*) and cl. (*b*) of S. 248 of the old Code (corresponding to O. 21, R. 22 of the present Code) prevents us from accepting it.

With no strong inclination of any one of the three views stated above, and in order that our judgment may be unanimous, I would formally drop the conclusion I adopted in *Visvanathan Chetty* v. *Somasundaram Chetty* (6) and agree with

6. (1922) I L R 45 M 878 : 42 M L J 422. 7. (1923) 45 M L J 413.
9. (1921) 41 M L J 547. 5. (1917) I L R 44 C 954.
4. (1914) I L R 42 C 72 (P. C.)

F. B.
Rajagopala Aiyar v. Ramanujachariar.
Ramesam, J.

my Lord and Waller, J., on the first question referred to the Full Bench.

The second question referred to the Full Bench presents no difficulty. Once we are agreed that *Raghunath Doss* v. *Sundar Doss Khetri* (4) applies, that case is conclusive that the sale has not got to be set aside. Only if it has to be set aside, Art. 166 applies. If not, Art. 181, when the matter arises, under S. 47 or Art. 144 when the question arises in a suit [as in *Raghunath Das* v. *Sundar Das Khetri* (4)] would apply. I agree with my Lord's proposed answer to the second question and with the further order as to mesne profits and costs.

Waller, J.

Waller, J. :—I agree entirely with the Judgment of the learned Chief Justice and have nothing to add to it.

C. A. S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLACE.

Sri Rajah Bommadevara Satyanarayana Varaprasada Rao Bahadur Zemindar Garu ... *Petitioner** (*Petitioner in C. R. P. No.* 361 *of* 1922 *on the file of the High Court*).

v.

Sri Rajah Bommadevara Venkata Bhashyakarlu Rao Bahadur Zamindar Garu, minor by mother and guardian Venkatalakshmi Narasimhayamma Bahadur Garu ... *Respondent* (*Respondent in do.*).

Sir Rajah Bommadevara Satyanarayana v. Sir Rajah Bommadevara Venkata Bhashyakarlu.

Civil Procedure Code, S. 111—*Leave to appeal to His Majesty in Council—Order of a single Judge of the High Court in revision under S.* 115, *C. P. Code or S.* 107 *of the Government of India Act—Letters Patent* (*Madras*), *Cl.* 39 *and* 44.

The High Court has no power to grant leave to appeal to His Majesty in Council against an order of a Single Judge in revision under S. 115. C. P. Code or S. 107 of the Government of India Act.

Petition under cl. 39 of the Letters Patent, praying that in the circumstances stated therein the High Court will be pleased to grant a certificate to enable the petitioner herein to appeal to His Majesty in Council against the order of the High

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*C M P No. 1594 of 1923. 1st August, 1923.

4. (1914) I L R 42 C 72.

Sir Rajah Bommadevara Satyanarayana v. Sir Rajah Bommadevara Venkata Bhashyakarlu.

Court in C. R. P. No. 361 of 1922 presented against the order of the Court of the Subordinate Judge of Masulipatam in E. A. No. 438 of 1922 (O. S. No. 18 of 1920 on the file of the District Court of Kistna).

C. V. Anantakrishna Aiyar and *M. Ramachandra Rao* for the petitioner.

V. Rama Das and *V. Krishna Mohan* for respondent.

The Court made the following

ORDER :—This is an application for leave to appeal to the Privy Council against an order passed by one of us sitting as a single Judge, under S. 115 of the Civil Procedure Code and S. 107 of the Government of India Act. That order confirmed the order of the lower Court and dismissed the Civil Revision Petition filed in this Court. The present petitioner, who was the petitioner in the Revision Petition has applied to us to grant him leave to appeal to the Privy Council.

A preliminary objection is taken to this application on the ground that S. 111, C. P. C. bars any such application. S. 111 says notwithstanding anything contained in S. 109 no appeal shall lie to His Majesty in Council among other things (*a*) from the decree or order of one Judge of a High Court established under the Indian High Courts Act, 1861. This is manifestly an application for an appeal from such an order. It is difficult to see how the petitioner can escape the obstacle placed in his way by this section. His learned Vakil says however that under S. 39 of the Letters Patent a right of appeal is given in all cases of final orders or decrees of this High Court to the Privy Council and since the amendment of the Letters Patent whereby the right of appeal to two Judges from the judgment of a single Judge sitting in Revision has been taken away, this order which was passed in such proceedings has become final and therefore he contends that he is entitled to ask for leave. S. 44 of the Letters Patent expressly provides that any provision in the Letters Patent can be altered or controlled by the legislation of the Governor-General in Legislative Council ; and such an enactment is the Civil Procedure Code, and when there is express provision in that Code, we must hold that that provision must be given effect to even if it is possible to bring the case under the general wording of S. 39 of the Letters Patent. In these circumstances we have no other alternative but to dismiss the application with costs.

(Memorandum of costs will follow).

A. V. V. ——— *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. KUMARASWAMI SASTRI.

Thimmarazu Venkata Kutumba Rao. . .*Petitioner in C. R. P. No.* 251 *of* 1922* (*Appellant in A. A. A. O. No.* 25 *of* 1922 *Counter petitioners-decree-holder and purchaser*).

v.

Thimmarazu Venkatappa (of unsound) and onther *Respondents in both* (*Petitioners-Judgment-debtors No.* 3 *and* 4).

Civil Procedure Code, O. 21, *R.* 89—*Application under—Deposit by pleader's clerk—Legality of.*

Venkata Kutumba Rao *v.* Venkatappa.

Where an application under O. 21, R. 89, C. P. Code is made by the duly authorised pleader of a party, the fact that the required deposit is made by pleader's clerk instead of by the pleader himself, does not vitiate the application.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the Court of the Subordinate Judge of Bezwada in M.A. No. 4 of 1921 preferred against the order of the Court of the District Munsif of Nuzvid at Bezwada in C.M. P. No. 2150 of 1920 in O. S. No. 243 of 1919.

Appeal against the appellate order of the Court of the Subordinte Judge of Bezwada in M. A. No. 4 of 1921 preferred against the order of the Court of the District Munsif of Nuzvid at Bezwada in C. M. P. No. 2150 of 1920 in O. S. No. 243 of 1919.

B. Somayya for petitioner.

P. Narayanamurthi and *K. Kamanna* for respondents.

The Court delivered the following

JUDGMENT :—The application under O. 21, R. 89, C. P. Code was made by the authorised vakil of a person entitled to apply. We are not prepared to hold that the words " on his depositing in Court " make the application incompetent if the person who actually pays the money into the Treasury is not a pleader or recognised agent within the meaning of O. 3, R. 1. The decision in *Sarvi Begum* v. *Haider Shah* (1) is distinguishable by the fact that there the application under the

*C R P No. 251 of 1922 and A A A O No. 25 of 1922. 5th September, 1923.

1. (1917) 9 A L J 12.

Venkata Kutumba Rao v. Venkatappa.

section of the Code was not a competent one. The lower Court has found that the payer in this case was the vakil's clerk.

Rule 131 of the Civil Rules of Practice only requires that the lodgment schedule should be signed by the payer. It is not questioned that the money paid into Court was that of the respondents. The applicant is the guardian of the persons entitled to apply, the money is their money ; the mere fact that the vakil sent the money by the hand of his clerk instead of taking it to the treasury himself will not invalidate the application.

The Civil Revision Petition is dismissed with costs. The Civil Miscellaneous Second Appeal is also dismissed but without costs.

A. V. V. ——— *Revision dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Mahankali Sreeramulu and others *Petitioners* (Accused Nos. 2 to 6).*

Mahankali Sreeramulu *In re.*

Penal Code Ss.* 147 *and* 323*—Offences under —Conviction by trial magistrate—Conviction altered on appeal into one under S.* 160, *I. P. C.—Propriety of.

A conviction by a trial magistrate under Ss. 147 and 323 I. P. C. cannot be altered on appeal into one under S. 160, I. P. C. The proper course is to direct the accused to be tried on a charge framed under S. 160 I. P. C.

Sabir Hussain v. *Emperor,* 19 A L J 487 not followed.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Ellore Division in Crl. Appeal No. 30 of 1922 against the judgment of the Court of the Stationery Sub-Magistrate of Ellore in C. C. No. 161 of 1922.

V Suryanarayana for the petitioners.

V. L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—In this case five accused apply in revision to this Court to set aside their convictions by the appellate Magistrate under S. 160 I. P. C. They were originally convicted

*Cr. R. C. No. 976 of 1922, 17th September, 1923.
(Cr. R. P. No. 813 of 1922)

Mahankali Sreeramulu *In re.*

under Ss. 147, 323 I. P. C. by the trying magistrate but on appeal the appellate Magistrate acquitted the first accused altogether and changed the conviction of these five accused under Ss. 147, and 323 I. P. C. into one under S. 160 I. P. C. acquitting them of the offences which they were originally charged with. It seems quite clear to my mind that the conviction under Ss. 147 and 323 I. P. C. cannot be altered into one under S. 160 without a proper charge being framed and the accused tried again on the latter charge. It is not a case where an accused charged for a major offence is convicted of a minor offence where the major offence is not proved. The offence under S. 160 I. P. C. is different from those under the sections under which the accused were originally charged, for under S. 160 to establish an offence of affray it must be shown that the fight took place in a public place and that there was also a disturbance of the public peace. Neither of these facts are in evidence in this case. The Public Prosecutor has drawn my attention to a case in *Sabir Hussain* v. *Emperor* (1) in which a learned Judge of the Allahabad High Court converted a conviction under Ss. 147 and 323 I. P. C. into one under S. 160 in revision. But in doing so, he does not seem to have considered the propriety of altering the conviction in that manner and whether it was right to do so without giving the accused an opportunity to meet the charge under S. 160. No reasons are given and there is no discussion in the judgment as to whether such alteration could legally be made. The learned Judge thinking that on the evidence in the case an offence under S. 160 was made out, convicted the accused under that section in revision. I am unable to follow the precedent that has been so created. I am of opinion that the alteration of the charge under Ss. 147 and 323 I. P. C. into one under S. 160 is not justifiable in this case. The accused must therefore be acquitted of that charge. In the result all the accused succeed in revision. Their convictions and sentences must be set aside and the fines if paid be refunded.

A. V. V. *Appeal allowed and conviction set aside*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE WALLACE.

Chettiyotan Kannan Kutty and another *Appellants** (*Defendants Nos.* 1 *and* 3).

v.

Elaya Veettil Velu *alias* Elaya Chettiar Uralan and Manager of Kabbacheri Devaswam *Respondents* (*Plaintiff and 2nd defendant*).

Kannan Kutty *v.* Velu.

Landlord and tenant—Renewal of lease—Invalid renewal—Rights of parties—Notice to quit given by one of two Uralans—Validity of—Institutions of suit by one Uralan without consulting co-Uralan.

Where the renewal of a lease is found to be invalid, the rights under the prior tenancy continue to subsist and the tenancy continues to subsist and the tenancy could not be determined by the landlord without a proper notice to quit.

Ramunni v. *Kerala Varma Valia Raja,* I L R 15 M 166 ; *Kunhunni Panikkar* v. *Raman,* 10 L W 427 referred to.

A notice to quit given by one of two Uralans (trustees) of a devaswam without consulting the other, is invalid and inoperative to determine a tenancy.

Per Ramesam, J: :—(Wallace, J. *dubitante*)

The principle that in any transaction which creates or destroys rights in trust property all the trustees must be consulted does not apply to suits. It is sufficient if, in a suit instituted by one trustee, the other trustees are made parties.

Mariyil Raman Nair v. *Narayana Nambudripad* (1904) I L R 26 M 461 ; *Kunhan* v. *Moorthi* (1910) I L R 34 M. 406 referred to.

Second Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Calicut in A. S. No. 28. of 1920 (A. S. No. 190 of 1920 on the file of the District Court) preferred against the decree of the Court of the District Munsiff of Vayitri at Calicut in O. S. No. 104 of 1919 (O. S. No. 73 of 1918, Additional District Munsif's Court, Calicut).

K. P. M. Menon for appellants.

C. V Ananthakrishna Aiyar and *K. P. Ramakrishna Iyer* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS *Ramesam, J* :—The suit property belongs in jenmam to Kannancheri Devaswam of which the Uralans are the plaintiff and the 3rd defendant. Plaintiff's predecessor and the 3rd defendant leased it to the 1st defendant for a period of 12 years under Ex. A on 10—8—1897. Plaintiff brought

*S A No. 164 of 1921, 12th October, 1923.

Kannan Kutty v. Velu.

Ramesam, J.

the suit to recover the property on behalf of the Devaswam. The Munsif dismissed the suit. The Subordinate Judge decreed it. The 1st and 3rd defendants appeal.

The first point argued is that the suit filed by the plaintiff (one of the Uralans) without consulting the 3rd defendant is not maintainable. It is true that, in any transaction which creates or destroys rights, all the Uralans must be consulted [*V. A. Istoop* v. *V. K. Ayappan* (1) a case of demise ; *Chandu* v. *Kuttiyil Rayiru* (2) a case of melcharth]. But this principle does not apply to suits, provided the other Uralans are also parties (*Mariyil Raman Nair* v. *Narayanan Nambudripad* (3) ; *Kunhan* v. *Moorthi* (4)). The decision in *Savitri Antarjanuam* v. *Raman Nambudripad* (5) was distinguished in the former of these cases and has scarcely any authority after the latter. The remarks at page 689 of *Angamuthu* v. *Ramalinga Pillai* (6) in so far as they refer to suits are obiter. This is conceded by the counsel for appellants in reply. I hold that the suit cannot be dismissed for non-consultation of 3rd defendant provided it is otherwise maintainable.

The second point argued is that the suit is bad for want of notice to quit. Though the 1st defendant's tenancy under Ex. A, was only a tenancy for a term, it was converted into a tenancy from year to year by the payment and acceptance of rent after 1897 [see para. 3 (2) of the plaint which shows that rent was paid after 1897]. This is conceded by the respondent. The first respondent however, contends that the 1st defendant, having accepted by Ex. II, a renewal of the original lease by 3rd defendant only, cannot fall back on the tenancy from year to year. The Courts below found that Ex. II is invalid. That being so, the prior lease was not extinguished by Ex. II. It is true that the 1st defendant insisted on the validity of Ex. II in his written statement but the plaintiff repudiated it and as Ex. II has been proved to be invalid, the rights under the prior tenancy did not cease. Moreover, the 1st defendant's plea in para. 12 of the written statement. "This suit which is brought by the plaintiff alone to recover possession under the prior lease is not maintainable.", shows that he meant to rely on his rights under the prior lease as a defence to the suit. The prior lease has not been surrendered

1. (1913) 16 I C 435.
2. (1922) 42 M L J 280.
3. (1902) I L R 26 M 461.
4. (1910) I L R 34 M 406 : 20 M L J 951.
5. (1900) I L R 24 M 226.
6. (1920) 39 M L J 685.

Kannan Kutty v. Velu.

Ramesam, J.

or otherwise legally put an end to (see *Ramunni* v. *Kerala Varma Valiya Raja* (7) and *Kunhuni Panikkar* v. *Raman* alias *Thiramump* (8). The respondent also contends that the clause " you must give (me) the value of the Kuzhikoors and Chamayans. when, I am evicted at any time after the expiry of 12 years " in Ex. A dispenses with a notice to quit. I do not agree with this contention. A proper notice to quit is therefore necessary.

The next question is whether Ex. C which was issued by the plaintiff alone is enough. It is true that, in England it has been held that one of several joint tenants may issue a notice to quit and put an end to a lease created by all of them (see *Doe* v. *Chaplin* (9) ; *Doe* v. *Summereet* (12) followed in *Doe et Kindersly* v. *Hughes* (11) *Alford* v. *Vickery* (10). Apart from the fact that this rule has not been followed in India by the Bombay and Calcutta High Courts, as to which I express no opinion, it cannot apply to the present case where there is no joint tenancy. The Devaswam is the only owner of the property. It is represented by the Uralans both of whom must act to determine a tenancy lawfully created. None of the English cases is a case of trustees (see *Cassim Ahmed Mollo* v. *Yusuf Haji Ajam Pepardi* (13) which is a case of joint receivers). I therefore hold that the notice Ex. C is not a valid notice. The other question argued, whether the notice is a sufficient notice (only 15 days being allowed for quitting the land) need not be considered.

The appeal is allowed and plaintiff's suit is dismissed with costs of 1st defendant throughout.

Wallace, J.

Wallace, J :—I am in full agreement with my learned brother as to the necessity for a notice to quit and as to the invalidity of Ex. C which is the only notice given in the matter of the determination of the suit tenancy. This finding is sufficient to dispose of this second appeal. I own to some doubt on the proposition whether plaintiff was in law entitled to file his suit without consulting his colleague, since to adopt the language of *Kunhan* v. *Moorthi* (4), the remedial rights to this case, *viz.*, the right to eject 1st defendant would not accrue

7. I L R 15 M 166.
8. 10 L W 427.
9. 3 Taunt 119, 120.
10. 1 B and Ad. 136
11. 7. M and W 139.
12. 1 C and M 283.
13. (1916) 34 I C 221.
4. (1910) I L R 34 M 406 : 20 M L J 951.

to the trustees until they as a body after consultation had signified their will to determine the lease of 1st defendant and had communicated that will to him. As there was neither such consultation nor communication the remedial right did not accrue and therefore on the principle laid down in that case, it would not be competent for plaintiff alone to sue. I prefer at present however, not to rest my decision on this point which is not necessary for the disposal of this appeal. I agree that the suit be dismissed with costs of 1st defendant throughout.

A. V. V. — *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Loorthi Odayar — *Appellant* (2nd defendant).*

Gopalasami Iyer and another — *Respondents (Plaintiff and 1st Defendant.)*

Loorthi Odayar v. Gopalasami Iyer.

Transfer of Property of Act—S. 53—Fraudulent transfer—Avoidance of—Mortgage in part supported by consideration—Transaction intended to defeat creditors—Mortgage not wholly void —Debts discharged by transfer intended to defeat creditors—Proof of —Onus on transferee.

Where part of the money advanced under a mortgage is applied for the discharge of the debts of the mortgagor, the mortgage cannot be held to be wholly void under S. 53 of the Transfer of Property Act even where it appears that the transaction was intended to defeat creditors of the mortgagor.

Converting immoveable property into cash. is the most obvious and effective method of defeating and delaying creditors.

Where a mortgage document has been executed under circumstances which show that the object of the transaction was to defeat creditors of the mortgagors, the onus lies heavily on the mortgagee to prove the existence of the debts alleged to have been discharged from and out of the amount advanced under the mortgage.

Appeal against the decree of the Court of the 3rd Additional Subordinate Judge of Tanjore at Mayavaram in O. S. No. 93 of 1919.

A. Krishnaswami Iyer for appellant.

K. Bashyam Iyengar and *P. J. Kuppanna Rao* for respondents.

The Court delivered the following

JUDGMENTS :—*Venkatasubba Rao, J.* :—The question to be decided in this appeal is Is the mortgage (Ex. 1) exe- Venkatasubba Rao, J.

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*Appeal No. 257 of 1920. — 5th September, 1923.

Loorthi Odayar v. Gopalasami Iyer
Venkatasubba Rao, J.

cuted by the 1st defendant in favour of the 2nd defendant liable to set aside at the instance of the plaintiff under S. 53. of the Transfer of Property Act ?

[The learned Judge then discusses the evidence and comes to the conclusion that the 1st defendant executed the mortgage with the intention of defrauding the plaintiff and that the 2nd defendant was aware of that intention.]

The consideration for the mortgage deed is said to consist of

(1) Rs. 7,037-12-10 which is the aggregate amount of the debts due by the 1st defendant to third parties and which the 2nd defendant claims to have discharged. [The evidence as regards this item is discussed and the conclusion reached that the consideration to this extent did really pass for the mortgage document.]

(2) Rs. 1,873-8-0 said to be the amount which was due by the 1st defendant to the 2nd defendant on a promissory note of a prior date, namely, 20th May 1913.

[After discussing the evidence on the point, the judgment continues.]

The mortgage document having been executed in circumstances which show that the object of the transaction was to defeat the plaintiff, the onus was heavily upon the 2nd defendant to prove the existence of the debts alleged to have been discharged from and out of the consideration for the mortgage. In *Palamalai Mudaliar* v. *The South Indian Export Company* (1), Wallis, J., (as he then was) states the law thus :—" Now if the sale was effected with the object of preferring these two creditors to the plaintiffs and the other creditors, it is clear and is admitted, that the sale would not be voidable under S. 53 of the Transfer of Property Act, but the burden of proving this where the sale appears otherwise to be voidable is on the defendant and should be established by satisfactory evidence. " This principle was also accepted by Mitra and Caspersz, JJ., in *Rajani Kumar Dass* v. *Gaur Kishore Shaha* (2). I have come to the conclusion that there was no debt due by the 1st defendant to the 2nd defendant previous to Ex. I and that the recital in it to the contrary is false.

1. (1909) I L R 33 M 334 : 20 M L J 211.

2. (1905) I L R 35 S 1051 at 1053.

Loorthi Odayar *v.* Gopalasami Iyer. Venkatasubba Rao J.

(3) Rs. 1,088-11-2 is alleged to have been paid by the 2nd defendant to the 1st defendant at the time of the registration of the document. [The learned Judge discussed the evidence and concludes.] I am therefore not satisfied that this sum was really paid to the 1st defendant. Even assuming that it was paid, I have not the least doubt that the object of the payment was to defraud the 1st defendant's creditors, because, as pointed out in *Palamalai Mudaliar* v. *The South Indian Export Company* (1) converting immoveable property into cash is the most obvious and effective method of defeating and delaying creditors.

Having thus found on facts, I must now consider what the law on the subject is. In *Chidambaram Chettiar* v. *Sami Iyer* (3) it was held that where a transfer, though in part was for valuable consideration, was as regards the other part, only an arrangement to defeat creditors it was wholly void under S. 53 of the Transfer of Property Act. In that case, the assignment that was impeached was in favour of the creditor and the money obtained by the assignor was partially utilized for the payment of his debts. Nevertheless it was held that as the arrangement was to some extent a device intended to defeat assignor's other creditors, the transaction was entirely invalid and no effect could be given to it. The reason for this decision, as I understand it, appears to be this. A mere preference of one creditor to another does not render the transaction voidable under S. 53 of the Transfer of Property Act. But if it is shown that the object of the transaction is not merely to prefer a creditor but in addition is to defeat or to delay the other creditors, it then ceases to be a transaction by which merely a creditor is preferred but becomes a transaction to which S. 53 is directly applicable. The next step in the argument seems to be that the inclusion of a fictitious debt furnishes evidence of an intention to defeat the creditors and the transaction is thus wholly void against them. I may remark that this case is not an authority upon S. 53, because the learned Judges expressly state in their judgment that the question before them was to be decided with reference to general principles of justice and good conscience, the property with which they were dealing not being immoveable property and S. 53 not having therefore direct application. Apart altogether from this, the recent decisions

1. (1909) I L R 33 M 334 : 20 M L J 211.
3. (1906) I L R 30 M 6 ; 16 M L J 427.

Loorthi Odayar *v.* Gopalasami Iyer

Venkatasubba Rao, J.

of the Judicial Committee, *Musahar Sahu* v. *Lala Hakim* (4) and *Minakumari Bibi* v. *Bijoy Singh Dudhuria* (5) place the matter beyond doubt. In the former at page 525, an extract is given from the judgment of Palles C. B. In *In re Moroney* where it is stated that although the effect of the transaction or *even the interest of the debtor in making it* may be to defeat another creditor, it is not a fraud within the Statute. Their Lordships towards the close of their judgment say that a preference of one creditor to another is no ground for impeaching the deed even if the debtor was intending to defeat an anticipated execution by another creditor. In the latter case *Minakumari Bibi* v. *Bijoy Singh Dudhuria* (5) equally strong observations are made. Their Lordships say at page 671 "It may be that the judgment debtor preferred the plaintiff
and that he did this of set purpose, yet this would not stamp the transaction as a fraudulent transfer." On these authorities it is perfectly clear that the transaction before us cannot be regarded as wholly void as against the plaintiff.

I may add that in *Palamala Mudaliar* v. *South Indian Export Company* (1), *Rajani Kumar Das* v. *Gaur Kishore Shaha* (2), and *Ummachakutti* v. *Ummerkutti Haji* (6), the transactions were not held to be wholly invalid and effect was given to the deeds to the extent to which the consideration was applied for the discharge of the transferor's debts. I therefore hold that the mortgage in favour of the 2nd defendant is good to the extent of Rs. 7,037-12-10 and that the property is liable to be sold subject to this right of the 2nd defendant. The appeal will be allowed to that extent. The parties will pay and receive proportionate costs throughout.

Phillips, J. :—I agree.

A. S. V. *Appeal allowed Appeal Decree modified.*

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4. (1916) I L R 43 C 521. 5. (1917) I L R 44 C 662 : 32 M L J 425 (P C).
2. (1905) I L R 35 C 1051.
(1909) I L R 33 M 334 : 20 M L J 211. 6. (1915) 29 I L 583.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE KUMARASWAMI SASTRI.

Kasibhotla Venkata Seshamma ... *Appellant in all (petitioner).*

Kalaga Gunneswara Rao, minor by guardian Devarakonda Surayya ... *Respondent in all (Counter-Petitioner).*

Venkata Seshamma v. Gunneswara Rao.

Legal Representative —Plaintiff deceased —Petitions by several persons to be brought on record as legal representative —Grant of one, and rejection of others —Appeals from orders of rejection of latter —Maintainability —C. P. C.— O. 43 R. 1 (k) ; S. 2 (2) —Effect —Will set up by person whose petition is rejected —Genuineness of —Opinion on —Not to be expressed.

Several persons, including the appellant, applied to be brought on record as the legal representative of a deceased plaintiff. The application of one of them was granted, appellants' application being dismissed as out of time. *Held* that no appeal lay from the order rejecting appellants' application. Where a legal representative is brought on record there is no abatement within the meaning of O. 43 R. 1 (k) of the Code, nor is there any decree within the definition of S.2, cl. (2) thereof.

Held that the Court below erred in pronouncing upon the genuineness of the will under which the appellant claimed.

Appeals against the order of the Court of the Subordinate Judge of Narsapur in I. A. Nos. 584 and 585 of 1922 in O. S. No. 54 of 1922, I. A. Nos. 586 and 587 of 1922 in O. S. No. 56 of 1922 and I. A. Nos. 588 and 589 of 1922 in O. S. No. 64 of 1922 respectively.

Ganti Lakshmana and *V Viyyanna* for appellant.
B. Satyanarayana for respondent.

The Court delivered the following

JUDGMENT :—These appeals arise out of the order of the Subordinate Judge dismissing the application to be brought on record as the deceased plaintiff's legal representative. The appellant and others filed separate petitions to be brought on record and the Subordinate Judge directed that the person claiming to be the adopted son of the deceased be brought on record. The appellant's application was dismissed as out of time. It is admitted that the suits have been withdrawn by the adopted son with leave to file fresh suits. A preliminary objection is taken that no appeals lie from the orders.

A. A. O. Nos. 31, 32 and 33 of 1923. 5th September, 1923.

Venkata Subbamma v. Gunneswara Rao.

We think that the contention should be upheld. O. 43 R. 1 (*k*) of the Code of Civil Procedure provides for appeals against an order under R. 9 of O. 22 refusing to set aside the abatement or dismissal of a suit. In the present case there has been no abatement. The application of one of several persons who applied to be brought on record as the legal representative was granted and it is difficult to see how there can be any abatement.

None of the cases cited by the appellant's vakils has any application, *Ayya Mudali Velan* v *Veerayyi* (1) was a case where it was held that the cause of action did not survive to the appellant. It was not a case of contest between real claimants and one of them succeeding. *Rama Rao* v. *The Rajah of Pittapur* (2) was a case where a defendant was struck out as an unnecessary party and the suit dismissed as against him. Where a legal representative is brought on record there is no abatement within the meaning of order 43 R. 1 (k) nor is there any decree within the definition of S. 2 Cl. 2.

In *Lakshmi Achi* v. *Subbarama Iyer* (3) it was held that no appeal lies from an order refusing to bring on record a person as legal representative on an application under O. 22 R. 3 and we think the present case is covered by the decision.

We think the subordinate Judge was wrong in having expressed any opinion on the genuineness of the will under which the petitioner claims. As he held that the petitioner was out of time and that the delay was not satisfactorily explained it was unnecessary to go into the merits of the claim. We express no opinion as to the genuineness or validity of the will or as to the appellant's rights there under.

The appeals fail and are dismissed with costs.

A. S. V. *Appeals dismissed.*

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1. (1920) I L R 43 M 812 39 M L J 218.
2. (1918) I L R 42 M 219 36 M L J 169.
3. (1915) I L R 39 M 488 28 M L J 491.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

A. R. P. R. Viswanathan Chetty *Petitioner** (*2nd defendant*).

M. N. M. Somasundaram Chetty *alias* Nagappa Chetty by his authorised agent V. A. R. M. Karuppan Chetty *Respondent* (*Plaintiff*).

Visvanatha Chetty v. Somasundaram Chetty.

Commission—Party—Examination on Commission—Application for—Order disallowing—Revision against—Interference in—Application by plaintiff—Application by defendant—Difference between.

The plaintiff and the defendant in a suit instituted in the Court of the District Munsif of Devakottah were both residents of Rangoon, and the defendant was served with summons at Rangoon. The plaintiff was allowed to examine himself on Commission at Rangoon. An application by the defendant to examine himself on commission at Rangoon was, however, disallowed by the Munsif on the ground that his demeanour could not be watched by the Court. *Held*, that the Munsif acted with material irregularity in disallowing the application and that his order was liable to be set aside in revision.

Difference between an application by a plaintiff to examine himself on commission and one by a defendant to examine himself on commission.

Petition under S. 115 of Act V of 1908 praying the High Court to revise the order dated 16—3—1923 of the Court of the District Munsif of Devakottah in I. A. No. 120 of 1923 in O. S. No. 225 of 1922.

G. Krishnaswami Aiyar and *R. Swaminatha Iyer* for petitioner.

E. Doraiswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—In this case the district Munsif has refused to issue a commission to examine the 2nd defendant as his own witness, and the revision is against that order. The learned Munsif dismissed the petitioner's petition rather summarily without noticing the importance of the fact that the defendant was the person applying and without his attention having been drawn to the cases which show in what manner a Court should deal with an application of a defendant to examine himself as a witness on commission as distinguished from an application by a plaintiff. A reference to the case *Rose* v. *Woodford* (1) and

*C. R. P. No. 582 of 1923. 5th November, 1923.

1. (1894) 1 Ch. 38.

Visvanathan Chetty v. Somasundaram Chetty.

to the case *Sarat* v. *Ram* (2) will show how a defendants application should be dealt with. In this case a defendant has been a resident of Rangoon with his family for many years. He was served with summons there. The plaintiff himself was a resident of Rangoon and was examined on commission himself there. In these circumstances the defendant should have been allowed to be examined on commission. The watching of his demeanour which the lower Court refers to in support of its order is not a sufficiently strong ground to justify the dragging of the defendant all the way from Rangoon to Ramnad. I would therefore set aside the order of the Munsif and direct him to issue a commission to examine the defendant in Rangoon as prayed by him.

It was argued that this was not a proper case for intervention in revision and reliance was placed on the observations of their Lordships in page 799 of the case *Balakrishna Udayar* v *Vasudeva Aiyar* (3).

Their Lordships recognise irregular exercise of jurisdiction as a ground for interference as the section also says. I think this is a case of such irregular exercise of the lower Court's powers in examining witnesses. In refusing to examine defendant on commission in the circumstances of this case the Court is acting with material irregularity as it might lead to his evidence being lost to the defendant altogether. The objection that it is not open to this Court to act in revision is therefore overruled.

The Respondent will pay the costs of the petitioner in this Civil Revision Petition but I do not interfere with the order as to costs in the lower Court.

A. S. V. *Petition allowed.*

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2. (1921) 35 C L J 77.
3. (1917) I L R 40 M 793 : 33 M L J 69 (P C).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Mele Vittil Kunhan Menon *Appellant** (*1st defendant*).

v.

Mele Vittil Kannan Menon and others *Respondents* (*Plaintiffs and defendants 2 to 12 and 14 to 36*).

Kunhan menon *v.* Mannan Menon

Civil Procedure Code, O. 40, R. 1—Appointment of Receiver—Right to—Suit for partition—Malabar tarwad.

For the appointment of a Receiver in a suit, there must be some substantial ground for interfering with existing rights of possession. The fact that no harm would be done by such appointment is not a sufficient ground.

As regards the right to have a Receiver appointed, a member of a Malabar tarward suing for partition of tarward property is not in the same position as a member of a Mitakshara joint family suing for partition.

Appeal against the order of the Court of the Subordinate Judge of Palghat dated the 3rd day of April 1922 in M. P. No. 1500 of 1921 in O. S. No. 39 of 1921.

The Advocate General (*C. Madhavan Nair*) and *K. Sankunni Nair* for appellant.

K. P. M. Menon and *P. Govinda Menon* for respondents.

The Court delivered the following

JUDGMENT :—The parties are Nair subjects of the Cochin State. The suit has been brought in a British Court to obtain partition of properties in British India. The Subordinate Judge of Palghat has appointed a Receiver to manage these properties *pendente lite*.

When a member of a Mitakshara joint Hindu family sues for partition, his right to become divided is self evident and it may be taken for granted that, unless he makes default, he will get a decree, the form that the partition will take being alone left in issue. There is no such certainty about the present case. The theory that the plaintiff can take his newly acquired right to partition under the Cochin Regulation, carry it with him as his personal law into a foreign country and impress immoveable property lying in that country, where partition among Nairs is not the law of the land, with the character of partibility is a

*A A O No. 153 of 1922. 29th August, 1923.

Kunhan menon v. Kunhan Menon

novel one and will need to be established at the trial. Meanwhile the plaintiff has not a *prima facie* right to ask for a Receiver. Moreover the Judge has not found that there is any danger of waste. He says that "no harm will be done" by the appointment of a Receiver, and that if the plaintiff has first to prove his right to partition it will be "too late" to appoint a Receiver. This is not enough. There must be some substantial ground for interfering with existing rights of possession (vide *Sivagnathammal* v. *Arunachalam Pillai* (1)). We therefore set aside the lower Court's order with costs of this appeal.

A. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Gangabattula Kanthamma *Appellant* (Petitioner)*

v.

Manchiraju Reddipantulu and another *Respondents (2nd and 1st Counter Petitioner).*

Execution Sale —Parties to contract of —Court conducting sale —Position—Civil Procedure Code, O. 21, R. 84—Deposit of 25 per cent. required by—Failure to make—Re-sale on account of —Deficit at —Bidder's liability for—Bidder acting as agent, but not communicating fact to Court or Nazir—His liability in case of Contract Act, S. 230, cls. (1) and (2) —Applicability —Mode of enforcing bidder's liability for deficit—O. 21, R. 71—Effect—Interest on deficit amount—Liability for—Appeal—Dismissal—Respondent unnecessary—Costs of—Order as to.

Where in Court auction a property is sold, the auction-purchaser is one party to the contract, but the other party to the contract is not the judgment-debtor or the decree-holder but the Court itself. In selling property in Court auction the Court acts under the statutory powers given to it by the Code and not as the agent of any party, and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side, and the auction-purchaser whose bid is accepted on the other.

A person, therefore, who bids at a Court-auction without informing the Court or its officer conducting the sale that he does so only as the agent of a principal, makes himself personally liable for the deficit caused by his action in not completing the sale by depositing 25 per cent. of the purchase-money. The fact that the judgment-debtor knew that the person bidding was bidding only as an agent of a principal is quite immaterial. In such a case, O. 21,

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*A A A No. 7 of 1923. 18th October, 1923.

10 M. L. T. 490.

R. 71 of the Code gives the Court power, at the instance of the judgment-debtor, to collect in a summary manner by way of execution the deficit that has been caused from the person bidding.

Under O. 21, R. 71, the bidder who makes default is not liable for interest on the deficit amount from the date of the order directing him to pay the amount. He is, however, liable for interest after that date.

A respondent who is unnecessarily made a party to an appeal and against whom no relief is granted is entitled to his costs of the appeal.

Appeal against the order of the Court of the Subordinate Judge of Cocanada dated 5th September 1922 in C. M. A. No. 5 of 1922 preferred against the order of the Court of the District Munsif of Cocanada dated 13th February 1922 in E. A. No. 1118 of 1921 in O. S. No. 443 of 1916.

P. Somasundaram for appellants.

B. Jagannadha Dass and *C. Rama Rao* for respondents.

The Judgment of the Court was delivered by

Krishnan, J. :—This is an appeal against the appellate order passed by the Subordinate Judge of Cocanada in appeal to him from an order of the District Munsif of Cocanada in an execution proceeding. The appellant before us was the judgment-debtor under a decree passed by the District Munsif's Court which was under execution, and her property was advertised for sale in Court auction. The sale was actually held by the Nazir, the Court officer, in the usual way and the 1st respondent bid for the property and offered a price of Rs. 4,600 which was accepted by the Court officer and the bid was knocked down in his favour. Under O. XXI R. 84 C. P. C., the purchaser is bound to pay 25 per cent of the purchase money on the completion of the auction. The 1st respondent made default in making the payment and in consequence under the same rule the property was again put up for sale. This time the property was knocked down for a lower sum, namely, Rs. 3,750 thus leading to deficit of Rs. 850. The judgment-debtor applied to the Court under O. 21, R. 71, C. P. C., that the auction-purchaser, the 1st respondent should be made liable for this deficit and should be called upon to pay the amount of the deficit into Court, and the District Munsif passed an order in her favour. The appeal from this order was heard by the Subordinate Judge, and he was of opinion that the 1st respondent might have bid for the property as the agent of the 2nd respondent and that as an agent he would not be responsible to

Krishnan, J.

Kanthamma v. Manchraju Reddi Pantulu

Krishnan, J.

pay this deficit amount under cl. (1) of S. 230 of the Contract Act which says that an agent cannot personally enforce contracts which he has entered into on behalf of his principal nor can he be personally bound by them. No evidence had been taken on this point in the first Court and therefore the Subordinate Judge remanded the case to the first Court to take evidence in order to ascertain whether the 1st respondent was actually the agent of the 2nd respondent as he subsequently alleged after the sale was over ; and as it was pleaded that in any case, even if 1st respondent was an agent, as he did not disclose the name of his principal at the time of the bid, cl. (1) would not apply, the Subordinate Judge, thinking that if the judgment-debtor whose property was sold in auction did actually know that the 1st respondent was bidding as the agent of the 2nd respondent that would take the case out of cl. (2) of S. 230 of the Contract Act, directed evidence on that point also. In taking this latter view, he treated a sale in Court auction as a contract between the owner of the property sold, namely, the judgment-debtor, and the auction-purchaser, apparently considering that the Court and its officer were merely acting as agents for the judgment-debtor for selling the property. We are unable to accept this view which he has adopted. Where in Court auction a property is sold, the auction purchaser is one party to the contract, but the other party to the contract is not in our view the judgment-debtor or the decree-holder but the Court itself. In selling property in Court auction, the Court acts under the statutory powers given to it by the Code and not as agent of any party and the contract that is made when the bid is accepted and confirmed by the Court is one between the Court on the one side and the auction-purchaser whose bid is accepted on the other and therefore before cl. (2) of S. 230 of the Contract Act can be excluded it must be alleged and proved by the party wishing to take advantage of S. 230, cl. (1) that when making the bid or before doing so he had informed the Court or the Court officer who was acting on behalf of the Court in selling the property that he was making the bid only as the agent of some named third paty. It would then be open to the Court officer, the Nazir, either to accept his bids or decline them if he is not fully satisfied that he had a proper power of attorney to make the bid. In this case it is not pretended that there was any power of attorney which the 1st respondent had from 2nd respondent or that any power of attorney was shown to the Nazir, nor is it even alleged that before the sale took

Kanthamma v. Mancharaju Reddi Pantulu

Krishnan, J.

place the 1st respondent informed the Nazir or the Court that he was bidding as an agent. Therefore even if we assume that the 1st respondent was really the agent of the 2nd respondent, we have here a case where the agent did not disclose the name of his principal, and did not even inform the other party, the Court, that he was acting as, the agent of a principal. The question whether the judgment-debtor knew or not that the 1st respondent was bidding as an agent of the 2nd respondent is therefore quite immaterial. The Court was entitled to enforce the contract against the 1st respondent personally, and as the 1st respondent made himself personally liable for the deficit that has been caused by his action in not completing the sale by depositing 25 per cent. of the purchase money. O. 21, R. 71, C. P. Code gave the Court power, at the instance of the judgment-debtor to collect the deficit that has been caused in a summary manner by way of execution. In these circumstances, we think that the order of the District Munsif was right and that there is no object in taking evidence which the Subordinate Judge has directed to be taken as to whether the 1st respondent was really the agent of the 2nd respondent, or not, and whether the judgment-debtor knew of it, for, even assuming that he was an agent, as he never disclosed to the Court officer that he was bidding as an agent till a long time after the bid was offered and accepted, he is liable for the deficit personally. Whatever rights there may be between him and the 2nd respondent he may enforce as advised but they need not be considered now at all. The order of the Court directing him to pay the money into Court is therefore correct.

The rulings relied upon by the Subordinate Judge in *Mackinnon Mackenzie and Co.* v. *Lang Moir and Co.* (1) followed in Lahore in *Lyallpur Sugar Co.* v. *Mulraj* (2) are not relevant here, for it is only in the view that the judgment-debtor is a party to the contract of the auction sale that they become of any importance and necessitate a finding on the question whether the judgment-debtor did actually know that the 1st respondent was acting as the agent of the 2nd respondent.

There is one other small point which has been dealt with in the argument and that is the question whether the defaulting auction purchaser, the 1st respondent, is liable for interest on the deficit amount from the date of the sale to the date of the order of the District Munsif directing him to repay. There

1. I L R 5 B 584. 2. (1922) 65 I C 473.

Kanthamma v. Manchiraju Reddi Pantulu — Krishnan, J.

is nothing in O. 21, R. 71, C. P. Code that speaks of interest and we think therefore that he is not liable for interest between those dates. Of course he is liable for interest after the date of the order of payment. With this variation we must allow the appeal of the appellant, set aside the order of the Subordinate Judge and restore that of the District Munsif.

As regards costs, the 1st respondent will pay the costs of the appellant throughout. As regards the 2nd respondent's costs, the claim against him was expressly given up by the appellant in the first Court and therefore there was no necessity to make him a party in this appeal before us. As we are giving no relief against him, we think he is entitled to the costs of this appeal from the appellant.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

A Sonachalam Pillai and others .*Appellants and Petitioners** (*Petitioners in C. M. P. No.* 1963 *of* 1923 *in Appeal No.* 232 *of* 1923 *on the file of the High Court*).

v.

Kumaravelu Chettiar and others *Respondents in both* (*Respondents in do.*).

Sonachalam Pillai v. Kumaravelu Chettiar

Letters Patent—Cl. 15—*Judgment —Meaning— Execution of decree —Stay of —Order of Single Judge refusing —Appeal against.*

An appeal lies under cl. (15) of the Letters Patent against the order of a single Judge of the High Court refusing to stay the execution of a decree.

Meaning of the word "Judgment" in cl. (15).

The fact that part of a decree is declaratory is no bar to a stay of the execution thereof being granted pending an appeal therefrom.

Letters Patent Appeal against the order dated 17th October, 1923 of the Hon'ble Mr. Justice Wallace in C. M. P. No. 1963 of 1923 in Appeal No. 232 of 1923 preferred to the High Court against the decree of the Court of the Subordinate Judge of Tuticorin in O. S. No. 2 of 1920 and

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*L P Appeal No. 20 of 1923 and C M P No. 3343 of 1923. 16th November, 1923.

Souachalam Pillai v. Kumaravelu Chettiar

petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to issue an order directing stay of the execution of the decree in O. S. No. 2 of 1920, on the file of the Court of the Subordinate Judge of Tuticorin pending disposal of L. P. Appeal No. 20 of 1923 on the file of the High Court, preferred against the order dated 17th October, 1923 in C. M. P. No. 1963 of 1923 on the file of the High Court.

T. R. Venkatarama Sastri, Nallasivam Pillai and *K. S. Sankara Iyer* for the appellants and petitioners.

T. R. Ramachandra Aiyar, T. L. Venkatrama Aiyar and *V Sambandham Chetti* for the respondents.

The Court delivered the following

Krishnan, J.

ORDER :—*Krishnan, J* :—This is an appeal under cl. (15) of the Letters Patent against the order of Wallace, J. sitting as a single Judge in the Admission Court, refusing to stay execution of the decree in O.S. No. 2 of 1920 on the file of the Subordinate Judge's Court of Tuticorin pending disposal of Appeal No. 232 of 1923 which has been filed against that decree and which has been admitted and is now pending in this Court. The suit was brought by certain Vaniyars of Tiruchendur in the Tinnevelly District for a declaration that they were entitled to enter the well-known temple there and go up to the figure of the Nandi in front of the inner shrine and for an injunction to restrain the Trustees and others from preventing them from doing so. The suit was decreed by the Subordinate Judge in their favour, and against that decree Appeal No. 232 of 1923 has, as already stated, been filed in this Court by the Trustees and others.

An application was made to Wallace, J. for stay of execution of the decree pending the disposal of the appeal and that having been refused, this present appeal is filed against that order.

A preliminary objection is taken to the appeal on the ground that no appeal lies under cl. (15) of the Letters Patent against an order refusing to stay the execution of a decree. The decision of this question turns on the meaning to be given to the word "judgment" in cl. 15 of the Letters Patent. There is nothing in the Letters Patent itself to enable one to say what the exact meaning of the term "judgment" is and what orders would be covered by that term. The word "Judgment" is defined in S. 2 of the Code of Civil Procedure as meaning

Sonachalam Pillai v Kumaravelu Chettiar — Krishnan, J.

"the statement given by the Judge of the grounds of a decree or orders" passed by him. As this definition is intended for the construction of the word "judgment" as used in the Code of Civil Procedure only, it obviously cannot be applied to the word as used in the Letters Patent. The meaning of the word "Judgment" in the Letters Patent has been however the subject-matter of consideration in several reported cases. The earliest one which has been brought to our notice is the case of *De Souza* v. *Coles* (1) where at page 387 Bittleston, J. laid down that "it must be held to have the more general meaning of any decision or determination affecting the rights or the interest of any suitor or applicant." It was again defined by Couch, C. J. in the leading Judgment on the point in Calcutta in *The Justices of the Peace for Calcutta* v. *The Oriental Gas Co.* (2) as being "a decision, whether final, or preliminary, or interlocutory, which affects the merits of the question between the parties by determining some right or liability," and this definition was approved by Markby, J. Since then, the meaning of the term has again been considered by a Full Bench of the Madras High Court in *Tuljaram Rao* v. *Alagappa Chettiar* (3). There the then learned Chief Justice, Sir Arnold White was of opinion that the definition given by Bittleston, J. went too far and that the one given by the Calcutta High Court was too narrow, and he himself laid down the test to be applied to decide whether any particular order amounted to a judgment or not within the meaning of the Letters Patent as follows at page 7. "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the Court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause." And he added, "An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent." Following this latter part of the definition as to what is not a judgment he held in the particular case

1. (1868) 3 M H C R 384.
2. (1872) 8 Beng. L. R. 433.
3. (1910) I L R 35 M 1 : 21 M L J 1 (F B).

Sonachalam Pillai v. Kumaravelu Chettiar

Krishnan, J.

before him which was one of an appeal against an order refusing to frame an issue that no appeal lay, and that view was adopted by the Full Bench. Krishnaswami Aiyar, J. who sat with the learned Chief Justice also agreed with the view taken by him as to the meaning of the word "Judgment" and with the order proposed by him Ayling, J., the third Judge in the Full Bench merely contented himself by saying that he agreed that the answer to the quesion referred for disposal should be in the negative. He did not discuss the question as to what amounted to a judgment at all. This ruling has been since accepted by this Court as correctly laying down the meaning of the word "Judgment" and has been cited and followed in several subsequent decisions, see for example, the cases in *Srinivasa Aiyangar* v. *Ramaswami Chettiar* (4), *Kulasekhara Naicker* v. *Jagadambal Ammal* (5), *Kanyalal* v. *Paramasukdoss* (6) and *Krishna Reddi* v. *Thanikachala Mudali* (7). It has been brought to our notice that the same view has been accepted and followed by the Lahore High Court in *Gokal Chand* v. *Sanwal Das* (8), which, it may be noted, was an appeal against a refusal to stay the execution of a decree, and also in *Ruldu Singh* v. *Sanwal Singh* (9), where the learned Chief Justice of the Lahore High Court has considered the authorities and has accepted the view of the Madras High Court as to the meaning of the word 'Judgment.' In *Tuljaram Rao* v. *Alagappa Chettiar* (3) the learned Chief Justice elaborately discussed all the cases on the point and, as his judgment has been followed, as stated above, by this High Court since then, I think it only right that we should adopt the same definition. In explaining his meaning, the learned Chief Justice has referred to a number of instances in which he thought an appeal would lie, and one of the instances he mentions in his judgment is an order refusing a stay of execution. He says at page 8, "I should be prepared to hold that an appeal lay from an order refusing a stay of execution"; and he has resiled from his view to the contrary in *Srimantu Raja Yarlagadda Prasada Nayudu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayudu* (10), to which he was a party. No doubt, when the

4. (1915) 29 M L J 12.
6. 16 L W 608.
5. (1919) I L R 42 M 352 : 36 M L J 351 (F B).
7. (1923) 45 M L J 153.
8. (1920) I L R 1 Lah 348.
9. (1922) I L R 3 Lah. 188.
3. (1910) I L R 35 M 1 21 M L J 1 (F B).
10. (1901) I L R 24 M 358.

Sonachalam Pillai v Kumaravelu Chettiar — Krishnan, J.

learned Chief Justice said that an appeal lay from an order refusing a stay of execution in the Full Bench case, his observation was in a sense in the nature of an *obiter dictum* ; nevertheless we are bound to follow it and we cannot treat the case in *Srimantu Raja Yarlagadda Prasada Nayudu* v. *Srimantu Raja Yarlagadd Mallikrjuna Prasada Nayudu* (10) as good law. The case in 24 Mad. 358 as pointed out to us, has been followed in *Vairavan Chettiar* v. *Ramanathan Chettiar* (11) by another Bench of this Court, but in that case there is no discussion whatever on the point in issue as that case merely follows *Srimantu Raja Yarlagadda Prasada Nayudu* v. *Srimantu Raja Yarlagadda Mallikarjuna Prasada Nayudu* (10) ; and if I am right in thinking that 24 Mad. 358 is no longer good law, *Vairavan Chettiar* v. *Ramanathan Chettiar* (11) cannot be accepted as good law.

On the respondents' side besides the two cases in 24 Mad. 358 and 14 L. W. 701 above referred to, our attention was drawn to a number of unreported Letters Patent Appeals, namely, Nos. 24 of 1918, 15 of 1922, 38 of 1921 and 7 of 1923 and it was contended that it was the practice of this Court not to allow Letters Patent Appeals against orders such as the one before us. But all those cases, on a reference to them, will be found to be cases where stay of proceedings in the lower Court was refused ; they did not deal with stay of execution at all. Those cases stand on a different footing altogether, for they fall under the second part of the definition of the Chief Justice quoted above, namely, that " an adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, a judgment within the meaning of the Letters Patent. " In L. P. A. No. 7 of 1923 the appeal was against an order refusing an interim injunction. The learned Judges held an appeal lay. I have therefore, come to the conclusion that the preliminary objection cannot stand and must be overruled, as an appeal lies under the Letters Patent against the order of a single Judge refusing stay of execution pending the disposal of an appeal or Second Appeal in this Court.

On the merits I quite recognise that the learned Judge of this Court having exercised his discretion in refusing to stay

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10. (1901) I L R 24 M 358. 11. 14 L W 701.

execution, we should not interfere with such exercise of discretion unless there are strong grounds for it. But in this particular case, unfortunately, the learned Judge seems to have been led to the passing of the order that he made, by his view that there being a declaration of the rights of the Vaniyars in the judgment of the lower Court, he could not interfere with the injunction which formed part of the decree. I am unable to adopt this view, if it is adopted in all cases in which a consequential relief is granted along with the declaration, it would be impossible to stay execution. It seems to me that the issue of the injunction ordered by the lower Court in the decree could be stated by itself, and whatever rights the decree might have declared, it would not enable the parties to enter the temple and go to the place where they want to go to. I am, therefore, of opinion that the fact of there being a declaration is no bar to this Court staying the execution of the decree.

On the merits, I think that this is a case in which we should grant a stay with some modification of the order of the lower Court pending the disposal of the appeal here. On the one hand, the Vaniyars are anxious to enter the temple, see the deity and perform their worship, and it will be a great hardship to prevent them altogether from doing so pending the appeal which may last for some time in this Court.

On the other hand, there may be a good deal of truth in what the appellants say, *viz.*, that, if the respondents are allowed to enter the temple and go up to the Nandi, the temple will be desecrated and they will have to perform the ceremony of purification at considerable expense if they succeed in the appeal. I have, therefore, come to the conclusion that the respondents may be allowed to go up from the east to the dhwajasthambam in the temple just inside the gopuram wherefrom they may have a view of the idol and perform their religious worship there but that they should not be allowed to go further pending the disposal of the appeal.

I would, therefore, order a modified stay of execution by directing the appellants not to prevent the respondents from going up to the dhwajasthambam at times of worship and also directing them to let the respondents have a view of the idol when such worship takes place. The order of the lower Court will be stayed with that reservation.

Sonachalam Pillai v Kumaravelu Chettiar

Krishnan, J.

In the circumstances, I think the proper order as to costs is to direct each party to bear their own costs in the Letters Patent Appeal and of the petition for stay.

Waller, J. :—I agree that we should follow the ruling reported in *Tuljaram Rao* v. *Alagappa Chettiar* (3). Were the question still open to argument, I should myself be inclined to adopt the view of Bittleston, J. in *De Souza* v. *Coles* (1), that it is "Impossible to prescribe any limits to the right of appeal founded on the nature of the order or decree appealed against." The word "Judgment" in S. 15 of the Letters Patent includes decrees and orders. Judgment is defined in Halsbury as "any decision given by a Court on a question or questions at issue between the parties to a proceeding properly before the Court. In the Civil Procedure Code an order is described as the formal expression of any decision of a Civil Court which is not a decree. This description is wide enough to cover all decisions of any kind interpreted and so the Code has provided that only certain orders can be appealed against.

The word "Judgment" as employed in S. 15 of the Letters Patent is a very general term. The Statute does not define it or limit its operation in any way. I venture to doubt whether we are entitled to define it or limit its operation by judicial interpretation. What has been achieved by that process is an *a priori* classification of interlocutory orders into interlocutory orders proper and interlocutory orders which amount to judgments. I think that all orders passed after contest *inter parties* are judgments within the meaning of S. 15 of the Letters Patent and that, if it be desired to limit the right of appeal againt certain orders, the proper method of achieving that end is by providing as has been done in the Civil Procedure Code that only certain orders can be appealed against.

I agree with my learned brother that the fact that part of the decree is declaratory is no bar to a stay of execution being granted. I understand that the parties are willing to accept a stay on the terms indicated. I therefore concur in the order of my learned brother.

A. S. V. *Order modified.*

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3. (1910) I L R 35 M 1.
1. (1868) 3 M H C R 384.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLER.

The Official Assignee of Madras *Appellant** (*Defendant*).

v.

N. Rajabadar Pillai (minor) and others ... *Respondents* (*Defendants*).

The Official Assignee *v.* Rajabadar Pillai

Hindu Law—Joint family—Manager—Account of family property on partition—Duty in regard to —Nature and extent of—Misappropriation by manager—Meaning of—Family house—Residence of members of family in—Nature of—Partition—Provision for residence in case of—Allotment of portion of family house—Necessity—Allotment of portion in other house—Allotment of money—If and when may be made.

When assets are traced into the hands of the managing memebr, he is bound to account for them on partition, whether his co-parceners are minors or majors. It is not enough for him to say that he has no longer got those assets. Capital monies proved to have come into the hands of a manager must be considered as available for partition, in the absence of evidence showing what has happened to them.

Misappropriation of family property by the managing member means nothing more than the expenditure of the money or other than justifiable family expenses. The right of members of a joint Hindu family to the family house is not a right inrem. While the house is being used as a family house, they have, no doubt, a right to reside there.

Quaere whether they have a right to any particular separate room. On partition, it is clearly a matter for the Court arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not.

Some other provision can be made if there are more houses than one to choose from. Provision may, if the general advantage of the family requires it, also be made in money instead of in kind.

On appeal from the decree dated the 21st March, 1922 of the Hon'ble Mr. Justice Krishnan, passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in O. S. No. 50 of 1920.

T. S. Rajagopalaier and *T. L. Venkataramaier* for appellant.

P. Venkatramana Rao, N. K. Mohanarengam Pillai and *N. Damodaram Naidu* for respondents.

The Court delivered the following

*O. S. Appeal No. 55 of 1922. 12th Oct. 1923.

The Official Assignee v. Rajabadar Pillai
—
Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—This is an appeal from the judgment of Krishnan, J. in a partition suit—from so much of his decree as directed that the first defendant should account for a sum of Rs. 6,500 shown to have come into his hands as part of the joint family assets. The 1st defendant was the manager of a joint Hindu family governed by the Mitakshara Law, the other persons interested being a minor brother, and their mother and sister who were entitled to rights of maintenance. The 1st defendant has become an insolvent and the Official Assignee of Madras on behalf of his creditors represents his interest. The facts so far as they are relevant are that Rs. 6,500 which formed part of the ancestral property were deposited in a Bank, and, some years ago, drawn out by the 1st defendant. Of that amount Rs. 2,500 were deposited with Messrs Beardsell & Co., as security for the honesty of the 1st defendant who was entering the service of that firm as cash-keeper. The balance has disappeared. There was a suggestion that it was used by the 1st defendant for purpose of his own marriage or other legitimate family expenses. But this was negatived by his mother who stated that she had found the necessary money for the marriage and by the fact that the sums were drawn out sometime after the marriage, and no evidence was forthcoming of any other necessary family expenditure which could not be met out of the income. The 1st defendant was not called as a witness. It was suggested that he was helping his relations as against his creditors which might account for the Official Assignee not calling him as a witness. But all his affairs were in the hands of the Official Assignee who had every opportunity of examining the insolvent and ascertaining the true facts. The money was drawn by the 1st defendant in 1914. In 1918 he was found to have committed defalcations in his office of Cash-keeper to Messrs Beardsell & Co., amounting to Rs. 15,000. It is possible that the balance of the money so drawn out by the 1st defendant was invested in some other manner. At the time, he told his mother that he was lending a large part of it to a Muhammadan, a business man ; but there is no evidence that this loan is still outsanding, and it is much more probable that it was ultimately used to meet the defalcations in Messrs Beardsell & Co., or to meet the 1st defendant's losses in some unfortunate speculations which led to his making away with this large amount of Beardsell's money.

The Official Assignee v. Rajabadar Pillai — Sir Walter Schwabe, C. J.

The learned Judge has held that the 1st defendant has received these moneys and has not accounted for them except as to the Rs. 2,500 mentioned. He has held further that it is a rule of Hindu Law that a co-parcener upon partition is not entitled to call upon the managing member to render an account of his past management so as to debit him with any loss caused to the joint property by his management but can only get his share in the properties available for division at the time of the partition, and for this proposition he quotes *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1) and *Krishnayya* v. *Guruvayya* (2). He points out that there is an exception to this rule, when a person is able to establish misappropriation on the part of the manager. He also holds that there is another exception, namely, that if a co-parcener is a minor, the manager can be made to account generally in respect of the *corpus* of the estate, at any rate where there are no adult members except the manager and as the plaintiff in this case was at all material times a minor, he holds that the first defendant must bring into account this sum of Rs. 6,500.

I agree to the result arrived at, but I do not agree with the reasons given. That a managing member is not bound to give a general account of his dealings, that, in the absence of fraud or misappropriation, the managing member cannot be called upon to justify his past transactions, that the manager is not bound to keep general accounts and that co-parceners cannot complain if the manager in his discretion favours in his expenditure one of the co-parceners at the expense of the others are matters, I think, beyond controversy ; nor do I find any authority in support of the proposition that in this matter there is any difference between the position of an infant co-parcener and another. In fact, on an examination of the cases establishing these propositions, it will be found that in most of them there were persons who were minors at the date of the partition or had been minors at the time of the expenditure by the manager. But in respect of assets proved to have come into the hands of the manager, in my judgment, he has to account. It is not enough for him to say that he has no longer got those assets ; nor do I think it right to say, once it had been proved that the assets came into his hands, that the co-parcener has also to prove that they remained in his hands at the date of the partition. In my judgment, capital monies proved to

1. (1908) I L R 32 M 271. 2. (1921) 41 M L J 503

The Official Assignee v. Rajabadar Pillai

Sir Walter Schwabe, C. J.

have come into the hands of a manager must be considered as available for partition, in the absence of some evidence showing what has happened to them. It is not necessary in this case to discuss what would be sufficient evidence. It may be that the proof of family necessities which would involve an expenditure greater than the income would lead to the presumption that the assets have been properly expended on behalf of the family. But, in this case, there is nothing of the sort, and I think that the proper inference to be drawn is that these monies have been misappropriated by the managing member. In this connection I think that misappropriation means nothing more than the expenditure of the money on other than justifiable family expenses. Rs. 2,500 were clearly misappropriated. It was a legitimate family purpose to place that money with Messrs Beardsell & Co., as security for the good behaviour of the managing member. But it remained joint family property and, when he caused the loss of that money to the family by his misconduct as an employee of Messrs Beardsell & Co., in my judgment, he clearly misappropriated the money. As regards the balance of Rs. 4,000 it was traced into his hands. It was proved that it was deposited in a Bank and that he drew it out. There is no evidence that he spent it on a family necessity, or that there was any family necessity for which such a sum of money would have been required, and, in my judgment, under those circumstances, when the assets are traced into the hands of the managing member, he is bound to account for them on a partition, whether his co-parceners are minors or majors, and in this case the first defendant and the Official Assignee representing him have entirely failed to do so. If authority were required for these propositions, I think, it is to be found in the account that was ordered in *Balakrishna Aiyar* v. *Muthuswami Aiyar* (1), and in the clear judgment on the point of Phillips and Krishnan, JJ. in *Krishnayya* v. *Guruvayya* (2), particularly of Krishnan, J. at page 509 where he states the law correctly. It was suggested that *Tami Reddi* v. *Gangu Reddi* (3) was an authority to the contrary, but as I read the judgment, particularly on page 287, it supports the view expressed above.

The result is that this appeal must be dismissed with costs.

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1. (1908) I L R 32 M 271 : 19 M L J 70 2. (1921) 41 M L J 503.
3 (1921) I L R 45 M 281 : 42 M L J 570.

The Official Assignee v. Rajabadar Pillai — Waller, J.

Waller, J. :—I agree that this appeal must be dismissed with costs. The rule of law, as stated by Krishnan, J. is that a co-parcener can get a share only in such properties as are actually available at the time of partition. If this means that, when a manager is asked to account for missing property, it is a sufficient answer on his part to point out that it no longer exists, I cannot accept it as an adequate statement of the law. The ruling in *Balakrishna Aiyar* v. *Muthusami Aiyar* shows that it is open to a co-parcener to call upon the manager to account for specific items of property which are alleged to have come into his hands. Though he is not entitled to ask for a general account of the management, he is entitled to an account of the property at the time he asks for partition. And by that is meant not the property as it actually exists, but as it ought to be. This is the view taken in *Krishnayya v. Guruvayya* (2) and there is nothing to the contrary in *Tami Reddi* v. *Gangu Reddi* (3).

In the present case it is clear that the manager had to account for Rs. 6, 500. This sum of money he probably appropriated to his own use. In any event, it has not been proved that he spent it for any necessary or legitimate family purpose. He must therefore make good plaintiff's half share.

(Continuation of the Judgment pronounced in open Court this day).

The Chief Justice :—Another point arises under the judgment of Krishnan, J. The second and third defendants being the mother and sister of the co-parceners, he directs that they should have a maintenance of Rs. 15 a month, and that the daughter should have a sum of Rs. 2,000 for her marriage. He also holds that they should be allotted each a room in the house item 1, that is, the family house, for their residence. Now, it is objected that the last part of the order will seriously interfere with the most advantageous partition, namely, the sale of the house which is the only valuable family property that there is, if it is to be sold subject to a right of these two ladies each to have one room in that house. It is argued on the other hand that they have an absolute right to them, it being called a *right in rem*. In my judgment, it is quite wrong to say that the members of a joint Hindu family have rights *in rem* to residence in a particular house. It is true that, while it is being used as a family house, they have

1. (1908) I L R 32 M 231. 2. (1921) 41 M L J 503.
3. (1921) I L R 45 M 281 : 42 M L J 57.

The Official Assignee v. Rajabadar Pillai

Sir Walter Schwabe, C. J.

a right to reside there ; but I have serious doubts whether they have a right to any particular separate room ; but, on partition, it is clearly a matter for the tribunal arranging the partition to say whether it is in the general interest of the co-parceners that residence should be given in a particular house or not. Some other provision can be made if there are more houses than one to choose from. It may be for the general advantage of the family that provision should be made in money instead of in kind. I think that so much of this judgment as purports to hamper the Official Referee's discretion in effecting this partition by giving these two ladies an indefeasible right to occupy a certain part of this house is wrong and that the matter must go before the Official Referee to decide what is best to be done unfettered by any such direction.

Waller, J. :—I agree.

C. A S.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice.*

Assistant Commissioner of Labour. *Appellant** (*Respondent in both Land Cases Nos.* 8 *and* 9 *of* 1921 *on the file of the Court of the Chief Judge Court of Small Causes, Madras*).

Assistant Commissioner *In re.*

Court Fees Act, S. 8, Sch. I, Art. 1 *and Sch. II, Art.* 17 (A) (*ii*)—*Applicability of—Appeal by Government against award of compensation in a land acquisition case—Award by Chief Judge of Small Cause Court—Court Fee payable on appeal.*

Where the Crown appeals against an award of compensation in a land acquisition case, on the ground that the award is excessive, S. 8 of the Court Fees Act does not govern the appeal.

On an appeal by the Crown against an award of compensation by the Chief Judge of the Presidency Small Cause Court in a land acquisition case, the Court fee payable is that prescribed by Art. 1, Sch. I of the Court Fees Act.

*S R No. 9324 of 1923. 8th November, 1923.

THE TAXING OFFICERS REPORT WAS AS FOLLOWS.

The Government Solicitor has on behalf of the Assistant Commissioner of Labour filed an appeal against the award of the Chief Judge of the Madras Court of Small Causes in respect of two cases under the Land Acquisition Act

Reference under S. 5 of the Court Fees Act in Appeals sought to be preferred to the High Court against the judgments

Assistant Commissioner. *In re.*

In case No. 8 there were two claimants and in case No. 9 there was a different claimant. The Government Solicitor in the first instance filed a single appeal against the award of the Chief Judge in the two cases omitting the name of the claimant-respondent in case No. 9. He has now put in a petition to amend the appeal grounds by the addition of the name of this claimant-respondent, and put in another petition to consolidate the two appeals. The amount awarded by the Chief Judge is Rs 71,310 which is in excess of the amount found by the Land Acquisition Officer by Rs 42,763, and Government has appealed asserting that the amount found to be due by the Land Acquisition Officer is correct. In filing these appeals the Government Solicitor has paid a fee of Rs 15 only. The office took objection to this and the matter has been referred to me as Taxing Officer. The Government Pleader has appeared and argued on behalf of the Government Solicitor.

In the first place it is not contended that Rs. 15 is the correct amount. The section on which the Office seems to tax on Appeal is S. 8 of the Act or failing that Art. 1 of Sch. I. On the other hand the Government Pleader suggests that Art. 17-A of Sch. II of the Act is the correct Article to be applied. Considering this Article first, it may be pointed out that the material portions run:—

17-A. Plaint of Memorandum of Appeal in a suit

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(*ii*) to set aside an award ;

* * * * * * * * *

When the plaint is presented to or the Memorandum of Appeal is against the decree of—a District Munsif's Court or the City Civil Court...*Fifteen Rupees.*

a District Court or a Sub-Court... *Hundred Rupees* if * *

Two objections may be taken to the application of this Article. The first is that there is no suit. The procedure under the Land Acquisition Act is for the Land Acquisition Officer to issue notices to those claiming any interest in the land that he acquired informing them of the amount at which their claim is valued. They then appear before him and evidence, if necessary, is taken and the Land Acquisition Officer, if the claimants do not agree to the amount which he offers, refers the case to the District Judge for his decision, the reference being to the District Judge as the officer to whom such references should be made under the Land Acquisition Act. There is no plaint strictly speaking and no Court fees are paid by the parties as the reference is not made by the parties but by the Government. The District Judge or other officer to whom the reference may go (in Madras the Chief Judge of the Court of Small Causes is the officer to whom the reference is made) disposes of the reference and issues an award and against such an award an appeal lies, and under the Amending Act XIX of 1921 this is considered to be a judicial act and an appeal eventually lies to the Privy Council. If the Article is to be construed strictly it cannot be said that there is any suit and therefore Art. 17 is not applicable. Even if this Article were applicable it may further be argued that no reference is made to the Chief Judge of the Madras Court of Small Causes and for that reason too the Article is inapplicable.

I am inclined to press the word 'suit' in the Article as there is a section which appears to be more applicable to the case. This is S. 8. S. 8 runs :

Assistant Commissioner. *In re.*

and awards of the Chief Judge of the Court of Small Causes at Madras in Land Case Nos. 8 and 9 of 1921.

"The amount of fee payable under this Act on a memorandum of appeal against an order relating to compensation under any Act for the time being in force for the acquisition of land for Public Purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant."

This admittedly covers the case of all appeals not made by Government. But the Government Pleader contends that the use of the word 'claimed' excludes the case where the appeal is not made by the claimant, that is the person whose land is being acquired, but by the respondent, that is to say, Government or the party who may be acquiring the land through Government's instrumentality. Therefore if it is thought to press the word 'claimed' in the section I think it is only right that the word 'suit' should be pressed in the above Article. I myself, however, am inclined to allow a wider meaning to the word 'claim' than the Government Pleader is willing to admit. As your Lordship will be well aware, the word 'claim' comes from Latin 'clamare' which means, to cry out, call, proclaim, declare aloud, call upon. Looking up the New English Dictionary one gets the meanings, first of all, 'demand as one's due, to seek or ask for on the ground of right.' Next "to assert and demand recognition of a right or title, etc., often loosely used especially in U. S. for, contend, maintain, assert." This is the meaning that I would adopt in the construction of the section so that the last words would run "the difference between the amount awarded and the amount asserted by the appellant." I do not think this is straining the meaning of the word unduly and the construction has this merit that we put the Government and private parties on an equal footing so that there is not one Court Fee for the calimant and another for the respondent.

It may be said that the point is not one of practical importance because it is simply a question of one Government department paying and another department receiving and that it comes to the same thing in the end. This, however, is not correct. In the first place there are Imperial Department and Provincial Departments, one being financed by the Government of India and the other by the province. Apart from this, land is acquired for local bodies and Railway Companies and it is on these that the value of the Court Fee would ultimately fall. To bring these cases under Art. 17-A of Sch. II as sought by the learned Government Pleader may not be ultimately in the interests of Government.

Supposing this section be held to be not applicable, the only section applicable appears to be Art. 1 of Sch. I, "Memorandum of Appeal not otherwise provided for." This would have the same effect as applying S. 8 as in either case the amount of Court Fee should be *ad valorem* on the value of the appeal, and the value of the appeal in this case quite apart from S. 8, would be the difference between the amount awarded by the acquiring officer and the amount awarded by the Chief Judge.

The Government Pleader on the other hand contends that failing Art. 17-A and S. 8 the ultimate section is Sch. II, Art. 11 (*b*). Section 47 relates to the execution of the decrees and is clearly inapplicable. Section 144 deals with restitution and does not seem to apply. 17 Indian Cases is a decision of the Punjab Chief Court. It is a perfunctory expression of opinion, and should not be followed.

Assistant Commissioner for Labour *In re.*

This case coming for hearing upon perusing the reference made by the taxing officer, the Memoranda of the Grounds of

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NOTE BY MR. AMIRUDDIN, THE DEPUTY REGISTRAR, APPELLATE SIDE TO THE TAXING OFFICER.

The question of the payment of the correct Court-fee is under controversy in the above appeals filed by the Government against the awards made by the chief Judge, Small Causes Court in a Land Acquisition matter. The Government Solicitor filed one of these appeals by a payment of a court-fee Rs. 15 and pays no court-fees at all on the other. Along with these appeals the Government Solicitor presents a petition for their consolidation and bases on this his claim for exemption of the Court fees on the second of these appeals, contending that if consolidation is allowed one court-fee is payable on both the appeals.

I shall briefly examine only such of the facts as are absolutely necessary for the determination of the question of the Court-fees. For the purpose of providing habitation for the Adi Dravidas the Government acquired two plots of land under the Land Acquisition Act, the one belonging to Md. Azizullah and Sofia Begum and the other to Hajee Mohamed Akbar Sahib. The claimants being dissatisfied with the compensation awarded by the Land Acquisition Officer, a reference under S. 18 was made to the Chief Judge, Small Cause Court. The cases were registered in the Small Cause Court as Land Cases Nos. 8 and 9 of 1921. The Chief Judge disposed of these two cases by a common judgment but passed two different awards. Against these awards the Government appeal.

The question for consideration now is under what provision of the Court-fees Act should appeals, like these, where the Government is the appellant be taxed, and whether the Court-fee paid on the above appeals is correct. The further question is how far the principle of the collection of the court-fees in every appeal is affected by an order for consolidation.

I shall now examine the several provisions of the act which have a bearing on the questions mentioned above. The Government Solicitor pays a Court fee of Rs. 15 on one of these appeals on the ground that it falls under Arts. 17-A clause (*ii*) of the Court Fees Act. This article runs as follows :

17-A. Plaint or Memorandum of Appeal in a suit.

* * *

(*ii*) to set aside an award ;

"When the plaint is presented to or the Memorandum of Appeal is against the decree of a District Munsif's Court or the City

* * * *

Civil Court	*Fifteen Rupees.*
A District Court or a Sub-Court	*Hundred Rupees.*

The new Court-fees Act has introduced certain amendments shown above underlined, which has an important bearing on these appeals which I shall discuss later on. We have now to examine whether the appeals under consideration come within the four corners of this article. It is now well established that article 17-A (ii) is not applicable to appeals preferred by claimants to set aside an award made under the Land Acquisition Act, and that section 8 governs such cases ; but whether section 8 is applicable to cases where the Government is

Assistant Commissioner for Labour *In re.*

the Appeal sought to be preferred, and the awards of the Chief Judge.

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the appellant is a most ....question. The opening words of article 17-A (ii) seems to present some difficulty. It begins by saying "A plaint or memo. of Appeal in a *suit.*" The question is whether this is an appeal in a *suit* as such. The answer is that it is not, inasmuch as there is no suit to set aside an award as contemplated by this article. The proceeding before the Chief Judge is only under a reference made by the Land Acquisition Officer. Hence the initial requirements of this article is absent. The only way to make it applicable is to construe that the proceeding before the Land Acquisition Judge is in the nature of a suit and that the appeal from an award in these proceedings must be taken as an appeal in a suit. Apparently on some such construction as this, the observation in 17 I. C. 764 seems to be based, which lays down that in appeals against awards of the Land Acquisition Judge the provision of the Court Fees Act applicable when the Government is the appellant is Art. 17-A(ii) and not S. 8. This observation is at the most an obiter, the question not being the subject of investigation in that case, and the learned Judges of the Punjab Chief Court in awarding costs at the very last sentence of their judgment have made this observation without giving any reasons for it. Be that as it may. There is a greater difficulty in applying this article to appeals like these, for the amendments stated above seems to entirely place these appeals outside its purview. The amendment which enumerates the several Courts seriatim does not refer to the Court of the Chief Judge, Small Cause Court. The omission, whether accidental or deliberate, seems to be quite fatal to the applicability of this article. The Government Solicitor meets this difficulty in the following way but it does not seem to be very sound. He contends that under section 3 of the Land Acquisition Act the Court which should pass the award should be the principal Civil Court of the Original Jurisdiction. He contends that in the City of Madras though the High Court, Original Side, is the principal Court of Original Jurisdiction, but since it is not exercising that jurisdiction, the Court next in precedence which according to him is the City Civil Court should be taken to be the Court competent to deal with it and the Small Cause Court is analogous to this Court and that therefore the Court-fee is only Rs. 15 as on an Appeal from an award of the City Civil Court. This argument as I have already remarked is rather ingenious and seems to be absolutely untenable. It therefore appears that Article 17-A (ii) would not be applicable. On principle it would be rather strange to hold that there is one law for the Government and quite another for the people. No doubt the legislature can make such a difference but unless it is quite clear it will not be correct to strain the language of any act so as to put such a construction. Before I proceed further a word as to the practice. In this Court the practice has been to collect Court-fees under section 8 even when the Government were the appellants but after the decision in 17 I. C. it seems to have undergone a change but without any specific directions therefor and the tendency was to follow that decision. All this, was of course under the old Court Fees Act. But since the Act has undergone a radical change in this respect, the ruling on this Act will guide the future practice.

I shall now examine section 8, a provision of the Court Fees Act which is generally held applicable to Land Acquisition cases. The words 'the amount

The Government Pleader on behalf of the appellant.
The Advocate-General on behalf of the Government.

Assistant Commissioner for Labour *In re.*

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claimed by the appellant' at the end of that section seems to lend support to an argument which the Government Solicitor advances that it applies only when the appellant is a private party and not the Government, for the latter cannot in any way be said to claim compensation. There seems to be some force in this. On the other hand the words above mentioned seem to be capable also of a different interpretation and of being read as meaning "The difference between the amount awarded and the amount which the appellant claims should have been awarded." This no doubt is straining the meaning of the word 'claimed.' I shall not pursue this much further, for the amount of Court-fees chargeable will in no way be affected, if section 8 is held inapplicable, because if both section 8 and article 17-A (ii) are excluded, this will be a case not specifically provided for and hence article 1 Schedule 1 will come into operation and *ad voleram* fee on the subject matter in dispute will have to be collected a result which will be just the same as if section 8 were applicable. The statement given below represents the amount of the Court fees that should be collected under article 1 Schedule 1.

Statement.

Court-fees payable on the appeal with reference to each one of the awards separately—on the value as now given (which need revision)

	Value	Court-fee.
Land case No. 8 of 1921	Rs. 16,276 9 5	Rs. 1,004 15 0
Land case No. 9 of 1921	Rs. 26,486 15 4	0 1,372 7 0
	Total	Rs. 2,377 6 0

(If Court-fee is calculated on the aggregate of the two amounts involved in both cases, namely on Rs. 42,763-8-9 the fee will be Rs. 1,672-7-0 that is Rs. 704-15-0 less.)

The only question now remaining to be dealt with, is the effect of consolidation on Court-fees. There is no provision any where in the Court Fees Act or in any other enactment which lays down that when Court-fee is paid in one of the appeals the other appeal directed to be consolidated is exempt from payment of Court-fees. Consolidation is generally ordered as a matter of convenience of the Court and the parties, when two or more cases involving the same issue can well be disposed of as one case. This ought not to affect adversely the Government revenue which is leviable in every case of appeal. The party who seeks an adjudication on the points in dispute in each case must pay for it and consolidation which is a matter of procedure ought not to affect the revenue of the Government. The Government Solicitor however relies on the case reported in 34 M. L. J. page 279 but the facts of this case are entirely different and it is therefore inapplicable to these appeals. In that case the Government acquired several plots of land belonging to the same parties. Only one notice was served in respect of all the plots and the applicants made one application to the Collector under section 18 of the Land Acquisition Act to refer his objection for the award of the District Judge. For the purpose of convenience the District Judge treated the references as separate petitions and passed separate awards in each of them. The learned Judge in 34 M. L. J. 279 held that the fact the award contained several items does not

Assistant Commissioner for Labour *In re.*

The Court made the following

ORDER:—This is a stamp reference on the following facts. An award has been made under the Land Acquisition Act with which the party entitled to compensation was not satisfied, and under that Act the matter was referred to the Chief Judge of the Court of Small Causes for disposal, and he increased the award by an amount of Rs. 42,763. Being dissatisfied with that award, the department of Government interested prefers an appeal to this Court, and the question is what stamp that appeal has got to bear.

By S. 8 of the Court Fees Act ' the amount of the fee payable under this Act on a memorandum of appeal against an order relating to compensation under any act for the time being in force for the acquisition of land for public purposes shall be computed according to the difference between the amount awarded and the amount claimed by the appellant. ' Now it is argued for the appellant, that is to say the department interested, that that has no application where the Crown is the appellant because there is no difference between the amount awarded and the amount claimed by the appellant, the appellant in that case not being a claimant at all ; and the learned Advocate-General, who appears to represent the Crown as distinguished from the department interested, as the matter is of

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make it as many awards and that so far as the appellant was concerned there was only one award which was referred under Section 18 for the decision of the District Court and that the fact that in the arbitration proceedings before the District Court the award was split up ought not to be allowed to prejudice the right of the appellant to treat his award as one. It is on this ground that the learned Judge held the appellant to be equitably entitled to consolidation. The High Court has often deprecated the Practice of the Land Acquisition Authorities splitting up the lands belonging to the same parties and passing separate awards. See 34 C. 599 at 601. The plots of Lands in the appeals under consideration unlike the above case belong to two different persons, in whose favour, two distinct and separate awards have been passed. There is no question here of splitting up the lands at all, because they belonged to two different persons. Hence the case reported in 34 M. L. J. is inapplicable to the one under consideration. Besides it is no authority for the extreme position that the Government Solicitor takes when he contends that no Court-fee is payable in the other appeal. The conclusion that I have therefore arrived at is that the Court-fees should be collected under article 1, Schedule 1 and that consolidation even if granted ought not to affect the question of payment of the Court fees which should be collected on each of the appeals separately and not as on one consolidated sum.

Assistant Commissioner for Labour *In re*

general importance, agrees with that argument. It is certainly contrary to the dictum on the subject in *Kasthuri Chettiv.Deputy Collector, Bellary*(1), in which it was said that S. 8 was a special provision applicable to appeals against all orders, including awards relating to compensation for lands under the Land Acquisition Act. But I think on the proper construction of the section it has no application where the Crown is the appellant and that the dictum is too wide.

Then it remains for me to consider whether the article applicable is Art. (1) of Sch. I or Art. 17 (*a*) (*ii*) of Sch. II of the Court Fees Act. By the Land Acquisition Act XIX of 1921 a decision of the Court in a case like the present is to be deemed to be a decree under the Code of Civil Procedure of 1908. Schedule I, Art. 1 of the Court Fees Act provides the *ad valorem* fee payable on any memorandum of appeal, not otherwise provided for in this Act, presented to any Civil Court. .except those mentioned in S. 3, which has no application here. There is no doubt that this is a memorandum of appeal and, therefore, unless it is provided for elsewhere, it comes under that Article. Turning to Art. 17 (*A*) (*ii*), of Sch. II, a memorandum of appeal in a suit to set aside an award is provided for, and it was held by the Punjab Chief Court in *Secretary of State* v. *Baswa Singh* (2), which was tried in 1912, that Art. 17 (4) of the then Court Fees Act which corresponds, except in a matter which I will refer to in a moment, with Art. 17 (A) (*ii*) of the present Act, applied to a case similar to the present. I very much doubt whether that was a correct decision under that Act as it stood, because it involves the inclusion of a reference to a Court under the Land Acquisition Act in the words, 'a suit to set aside an award,' which is certainly not giving the ordinary meaning to those words, because the proceedings before the Small Causes Court or the District Court do not seem to be a suit to set aside an award. It has been held by the Privy Council in *Secretary of State for India* v. *Chelli Kani Rama Rao* (3), that the Court is itself in those cases sitting as an arbitrator and not as an appellate tribunal, though it is true that, in a sense, proceedings before the Court are to set aside the award, for if those proceedings were not taken, there is an antecedent award of the officer which would be binding. But it is not

1. I L R 21 M 269.
2. (1912) 17 I C 764.
3. (1916) I L R 39 M 617 : 31 M L J 324 (P C).

Assistant Commissioner for Labour *In re.*

necessary to give any decision on that point, because the words of the present schedule Art. 17 (A) (*ii*) provide a proper fee on a memorandum of appeal in a suit from a District Munsif's Court or a City Civil Court and another fee on a similar suit from a District Court or Sub-Court. It so happens in this case that the Court which has made the award, the Small Cause Court is not one of those enumerated Courts, whether it is by accident or design is immaterial, and therefore, I consider that Art. 17 (A) (*ii*) does not provide for a fee to be paid on this appeal even if it is looked upon as an appeal from a suit to set aside an award.

That being so we are thrown back on Art. 1 of Sch. I and the fee must be paid in accordance with the provisions of that Article. The costs of this reference will be paid by the department interested as appellant in the appeal to the Crown.

The two appeals not having been consolidated must be treated as separate appeals. Three weeks for the payment of the additional Court fee.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(On appeal from the High Court at Lahore.)

Ram Singh ... *Appellant**.

v.

Ram Chand ... *Respondent.*

P C.

Ram Singh *v.* Ram Chand.

Partnership at will—Dissolution—Legal right—Gross misconduct—Falsification of accounts.

A partner's right to dissolution of a partnership at will is a legal right which cannot be denied to him on the ground that he fraudulently falsified the partnership accounts.

Decree of the High Court reversed.

Appeal (No. 29 of 1923) from a decree of the High Court at Lahore, reversing a decree of the District Judge of Delhi.

The appellant instituted the present suit for a declaration that the partnership at will between him and the respondent was dissolved by notice. The District Judge made a decree

*P C No. 29 of 1923. 30th October, 1923.

for dissolution, though he found that the appellant was guilty of gross misconduct in falsifying the account books. On appeal, the High Court was of opinion that the relief claimed by the appellant was of an equitable naturt which could not be granttd to him on account of his misconduct. The decree of the District Judge was reversed by the High Court. Hence tht present appeal.

P. C.

Ram Singh v. Ram Chand.

The facts and Counsel's contentions are clearly indicated in their Lordships' Judgment.

Dube and *Bishen Narain* for the appellant.

De Gruyther, K. C. and *Parikh* for the respondent.

1923. Oct., 30. The Judgment of their Lordships was delivered by

Lord Dunedin.

LORD DUNEDIN.—This case is of the simplest nature. A gentleman who has a partnership at will brings a suit for a declaration of dissolution. The learned Judge of the District Court before whom the case depends finds and it is declared "that this partnership shall be deemed to have been dissolved on 11th February, 1911, the date of the notice of the plaintifi to the defendant," and then he makes a declaration in ordinary form as to accounts being taken, but he puts in one particular finding, No. 3 :—

"An account of all dealings and transactions between plaintiff and defendant from December, 1897, with the instructions that the debit of Rs. 7,559 against defendant and credit of Rs. 3,133 in plaintiff's favour are forgeries and are to be struck off, and all entries relating to interest payable to either party are wrong."

Both parties appealed against that finding. On appeal, so far as the finding of fraud is concerned, the High Court are entirely in accordance with the learned Judge, and they say in their judgment :—

"From the evidence on the record it is therefore clear that the plaintiff has been guilty of gross misconduct. He has destroyed the old account books, has falsely prepared a balance sheet, Ex. P. W. 1, has made false entries in the books and has tried to deprive the firm of a valuable asset."

If they had stayed there all would have been well, but they go on to say this :—

"Having done all this he has had the audacity of coming into Court with a prayer for an equitable relief."

But it is not an equitable relief, for which he is asking. When it is a partnership at will a partner is entitled to dissolution ; it is a legal right, under the Code and under the contract. Then the learned Judges quote a passage from "Lindley on

P. C.
Ram Singh
v.
Ram Chand.
Lord Dunedin.

Partnership" which deals with the circumstances in which a Court may order a dissolution of partnership during the term, which, of course, has nothing to do with this case

The appellant here has been forced to admit that he cannot ask for any alteration of paragraph 3 which has been read, and the respondent cannot support the judgment of the High Court, which says that there is to be no relief given ; but on the question of relief he practically says : " There is no room for an account here at all, because we have already seen that this gentleman has falsified all the account books, and there is nothing to account upon." That is really trying to make this Board do what the Commissioner ought to do when the accounts are being taken.

In the circumstances it is quite clear that the appeal must be allowed with costs, and the decree of the District Court restored. With regard to the costs of the appeal to the High Court which were ordered to be paid by the present appellant, their Lordships think that having regard to what took place there, neither party should have any costs, and any costs, paid under the High Court's order must be repaid. The future costs, which will be incurred on the further proceedings in the District Court will of course be in the discretion of that Court. Their Lordships will humbly advise His Majesty accordingly.

K. V. L. N. *Appeal allowed.*

Solicitors for appellant *Ranken Ford and Chester.*

Solicitor for respondent *T. L. Wilson and Co.*

PRIVY COUNCIL.

PRESENT :—LORD SUMNER, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

(On Appeal from the High Court of Bombay).

Jamnabai *Appellant*.*

Fazlbhoy Heptoola and others *Respondents.*

P. C.
Jamnabi
v.
Fazlbhoy Heptoola.

Partnership accounts—Suit by widow of partner—Compromise—Advocate's consent—Order—Liability to be set aside—High Court—Statement of facts and conclusion—Presumption.

In a suit for accounts of a partnership by the widow of a deceased partner, the plaintiff's Advocate consented to an order being made for an agreed amount, which was supposed by mistake to have been calculated up to the date of

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*P. C. Appeal No. 4 of 1922. 12th June, 1923.

P. C.

Jamnabai v Fazlbhoy Heptoola

death of the plaintiff's husband but was in reality the amount adjusted some two years before his death.

Held, that the consent order cannot be set aside unless serious and substantial injustice to the party is clearly shown.

The statement of facts and the conclusion as to those facts stated by the Court, must be presumed to have been based upon materials before the Court.

Decree of the High Court affirmed.

Consolidated appeal (No. 4 of 1922) from two decrees of the Bombay High Court, affirming two decrees of the same Court in its original jurisdiction.

(The facts and Counsel's arguments are fully indicated in their Lordships' judgment.)

1923. June 12. *De Gruyther K. C.* and *Parikh* for the appellant.

Lowndes K. C. and *Raikes* for the respondents.

1923. June, 12. The Judgment of their Lordships was delivered by

Lord Sumner.

LORD SUMNER.—These are consolidated appeals by one Jamnabai, the widow and executrix of Tricum Nathoo, who died so long ago as 1892. He had been a partner in a muccadamage firm, Khimji Jiwa and Co., with a gentleman called Khimji Jiwa, who had retired from the firm and had died before the time at which Tricum Nathoo died. The widow Jamnabai commenced these proceedings against certain persons who continued to carry on the same business as had been carried on by her late husband in partnership, although they changed the name of the firm. She brought an action for accounts, the principal object of which, so far as the present appeals are concerned, was to obtain an account and a share of certain buildings and the rents produced by those buildings, which originally had been purchased by her late husband and his partner while they were still in partnership. The buildings consisted on the one hand of a house built on the estate of the Port Trust in Bombay, and on the other of sundry godowns which were used in some way, not very clear, down to the date of the proceedings, by the defendants.

There are two appeals, from two decrees, which have been consolidated.

The first appeal relates to the alleged right of the plaintiff to have an account taken over a long series of years of the rents and profits of the godowns, she herself bringing into account the rents of the house, but this apparently is a secondary

P. C.

Jamnabai
v
Fazlbhoy
Hentoola
Lord Sumner.

matter, for the house has fallen into decay and is almost worthless.

The second appeal is brought in order that the appellant, Jamnabai, may have the opportunity of establishing her late husband's interest in the partnership business beyond the date to which the partnership account had been stated and balanced, and may have an account for that purpose. In order to succeed in that appeal, she has to establish her right to have an order set aside, which was in point of fact consented to by her advocate before the learned Judge who made the order. It may be convenient to dispose of the second appeal quite shortly.

The learned Judge records that when he had expressed the opinion that the form in which a previous order had been drawn up did not prevent the plaintiff from being entitled to have its terms rectified and to have the accounts, which she desired to obtain, taken on a footing wider than its terms stated, her counsel, having apparently considered the matter intimated that he did not press to have an account actually taken, and that he would be content with an order in her favour for payment of a particular sum which, according to the note which the learned Judge took, was accepted by the learned counsel, because he conceived it to be an amount agreed up to the date of the death of Tricum Nathoo, whereas it appears that it was really an amount agreed only up to the date of the last adjustment made in his lifetime, which was something like two years earlier. To that extent there is ground for saying, if the learned Judge's note was correct as a statement of the reasons which prompted the advocate at the time, that the advocate gave this consent under a mistake of fact, the gravity of which may be substantial or may not, and when the plaintiff discovered, as she afterwards did, that this order had been made, under which she would get payment of this particular sum, but would not get the account which she desired, she took proceedings to get the consent order set aside and to prefer her claim to the account.

Their Lordships have had on both appeals the advantage of an argument from Mr. De Gruyther, on behalf of the appellant, equally illuminating and candid. With regard to this appeal he accepted as the law, which governs his position, that serious and substantial injustice to his client must be shown to result from letting the consent order stand which was made under the circumstances mentioned. There has been some

P. C.

Jamnabai v. Faribhoy Heptoola.

Lord Sumner.

controversy as to whether his client was consulted by her advocate at the time when the consent was given. Upon that the High Court express no definite opinion, and all their Lordships need say is that they have not formed the affirmative opinion that she and her brother, who was assisting her and was present in Court, were not cognisant of what was going on, but it is unnecessary to express a definite opinion about it. The High Court after examining the circumstances with some care came formally to the conclusion that, so far from any possible injustice having been done to the appellant by the course taken, it probably was beneficial so far as she was concerned, because, while the account which she asked for apparently might have secured some few hundred further rupees in addition to the very much larger sum that she got under the consent order, she would have had to run risks as to costs and possibly otherwise, from which it was advisable to protect her.

Their Lordships see no reason whatever for revising the opinion upon this point formed by the High Court, and, that being so, the foundation upon which Mr. De Gruyther based his right to ask to have that order set aside and the account directed has failed. This appeal therefore is unsuccessful.

The first appeal Mr. De Gruyther has also frankly stated to have been rested all along upon the contention that the properties in question, the dwelling house and the godowns, were assets of the partnership of Khimji Jiwa and Co., and not merely buildings which these two gentlemen, the plaintiff's deceased husband and Mr. Khimji Jiwa, had bought for their own reasons, and apparently held as co-owners in equal moieties.

The High Court examined the facts with some care and based their judgment upon the conclusion of fact that the true position was co-ownership in the properties and not that they were partnership assets belonging to the firm of Khimji Jiwa and Co.

Their Lordships cannot see their way upon this question of fact to say that the conclusion of the High Court in this appeal was wrong. They have been pressed by Mr. De Gruyther, who has missed no point which possibly could have been raised on behalf of his client, to say that because the record does not set out the account to which the High Court referred in one or two passages, and because it may be argued that the mode of dealing with the rents of the properties, which the

P. C.

Jamnabai v. Fazlbhoy Heptoola.

Lord Sumner.

learned Judges either inferred or had stated to them, might have been different, the conclusion that they were dealt with in the way assumed is one that ought not to be supported.

It appears to their Lordships that they ought to presume that the High Court did not make these statements and come to this conclusion as to the facts without having had materials before it. Although normally all the materials are to be found in the record in one shape or another, certain documents have not been printed in this record which were available in the Court below, and the proceedings were proceedings in which there was much common ground, and their Lordships therefore think they have nothing to justify them in saying that the *prima facie* assumption of the correctness of the judgment below, which the appellant has to displace, has been successfully met.

The result therefore is that the appellant fails in this appeal also.

In their Lordships' opinion both appeals ought to be dismissed with costs, and they will humbly advise His Majesty accordingly.

Solicitor for appellant *E. Dalgado.*

Solicitors for respondents *Nicholl, Manisty and Co.*

K. V L. N. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE AND MR. AMEER ALI.

Mallireddi Ayyareddi *Appellant*.*

v.

Adusumilli Gopalakrishnayya and another *Respondents.*

(On Appeal from the High Court at Madras).

P. C.

Mallireddi Ayyareddi v. Adusumilli Gopalakrishnayya.

Mortgage—Lands with crops raised from time to time —Subsequent mortgage of lands alone—Auction-purchaser subject to mortgages—Payment to prior mortgagee by auction-purchaser—Realisation of part by sale of crops—Sale of lands in the subsequent mortgagee's suit—Proceeds—Subrogation—Priority—Transfer of Property Act (IV of 1882), S. 101.

Certain lands were sold in execution of a simple money decree, subject to three mortgages. The second of the mortgages comprised not only the lands but also the crops raised thereon from time to time. The second mortgagee obtained a decree on his mortgage and realised part of the decree by actual sale of crops and the rest was discharged by the auction-purchaser. The third

*P. C. Appeal No. 101 of 1921. 26th November, 1923.

P. C.

Mallireddi Ayyareddi v. Adusumilli Gopalakrishnayya.

mortgagee instituted a suit on his mortgage and obtained a decree, in execution of which he brought the properties to sale. After paying off the first mortgagee, there remained a balance of about Rs 1,300 to the credit of the suit. On the question whether the appellant or the respondents were entitled to the money in Court,

Held, that the auction-purchaser and his assignees (respondents) were entitled to subrogation of the rights of the second mortgagee to the extent they discharged his mortgage apart from the amount realised by him by the sale of crops.

Gokuldoss Gopaldoss v. *Rambux Seochand,* L R 11 I A 126 ; *Dinabandhu Shaw Chowdary* v. *Jogamaya Dasi,* L R 29 I A 9 ; *Mahomed Ibrahim Hossein Khan* v. *Ambika Prasad Singh,* L R 39 I A 68 22 M L J 468 (P C) followed.

Appeal (No. 101 of 1921) from an order of the Madras High Court (Oldfield and Seshagiri Aiyar, JJ.), affirming an order of the Temporary Subordinate Judge at Masulipatam.

The respondents applied for the issue of a cheque for the amount in deposit in Court out of the sale proceeds of the mortgaged properties. The appellant claimed priority and raised objection to the issue of the cheque. The Subordinate Judge granted the application and ordered the issue of the cheque to the respondents. On appeal, the High Court affirmed the order and hence the present appeal.

The facts are fully set out in their Lordships' Judgment.

1923. Nov, 1. *Narasimham* for the appellant. The respondents are not entitled to subrogation of the rights of the second mortgagee. Their assignors bought the mortgaged properties in execution of a simple decree and do not come within the provision of S. 101 of the Transfer of Property Act. Further, when the lands were threatened to be sold, the auction-purchasers agreed to pay the mortgages in full. This promise tantamounts to the personal covenant referred to in *Gokuldoss* v. *Rambux Seochand* (1) ; *Dinobundu Shaw Chowdury* v. *Jogmaya Dasi* (2) ; and *Mahomed Ibrahim Hossein Khan* v. *Ambika Pershad Singh* (3). If these cases are distinguished on the ground that there was no personal covenant in this case, the position becomes different. Further, the second mortgage was of the lands and crops raised thereon from time to time. The mortgagee realised part of his mortgage amount from the actual sale of crops. To that extent at least, the respondents cannot be entitled to subrogation. (It is admitted that so far as the present amount in dispute is concerned, the Order appealed against cannot be assailed, as the High Court, in the appellant's mortgage suit, declared that the respondents were entitled

1. L R 11 I A 126. 2. (1901) L R 29 I A 9 : 12 M L J 73 (P C).
3. (1911) L R 39 I A 68 : 22 M L J 468 (P C).

P. C.

Mallireddi Ayyareddi v. Adusumilli Gopalakrishnayya.

Lord Phillimore.

to subrogate to the rights of the second mortgagee by paying him the amount due on his mortgage.)

Dube for the respondent referred to the question of res-judicata on account of the above admitted decree and argued that was sufficient to dispose of the appeal in his favour.

1923 Nov., 26. The Judgment of their Lordships was delivered by

LORD PHILLIMORE.—Certain Indian landowners within the district of Masulipatam effected 1st, 2nd and 3rd mortgages on their property ; the 1st and 3rd being on the lands alone, the 2nd on the crops also. They were afterwards sued to judgment by some creditors for ordinary debts, and their lands were sold in execution of the judgment but subject to the mortgages. The purchaser of the equity of redemption was one Pingala, who paid rupees 1,000, and thereout the judgment debt was satisfied.

The second mortgagee then instituted his suit to enforce his mortgage, making the original mortgagors, the third mortgagee and Pingala defendants ; and having obtained judgment, he from time to time obtained orders for sale of the crops. In one case it would seem as if the crops were actually sold in execution ; in others, Pingala, or the present respondents who bought Pingala's interests during the course of the proceedings, paid the second mortgagee sums of money and saved the crops from seizure. While this was going on, the third mortgagee, who is the present appellant, brought a suit, making the original mortgagors and Pingala parties ; and in this suit the lands were sold out and out, freed and discharged from the mortgages. After payment of the amount due to the first mortgagee and the expenses of the sale and so forth, there remained in Court to the credit of the cause a sum of rupees1,327 with some annas and pies.

The respondents, the purchasers from Pingala, who had been added as supplemental defendants in the suit brought by the appellants, thereupon claimed to be subrogated to the second mortgagee, and in right of the latter, to receive this sum out of Court. They made this claim on the 22nd July, 1918, for the following reasons At the time of the decree in favour of the third mortgagee which was made on appeal by the High Court on the 13th February, 1917, there was still due to the second mortgagee the sum of rupees 1,990. Now the decree of the High Court provided that Pingala or his assignees should be at liberty to pay the amount due under the decree obtained by the second mortgagee, and that by doing so, they would be

P. C.
Mallireddi Ayyareddi v Adusumilli Gopalakrishnayya.
Lord Phillimore

relegated to the rights of that moregagee. Accordingly the respondents paid rupees 1,990 to the second mortgagee, and on the 20th of December, 1917, full satisfaction by payment through the Court was recorded.

The application of the respondents for the payment out of the money in Court was resisted by the appellant, who contended that when the owner of a property subject to several mortgages pays off a prior mortgage, he is not entitled to stand in the shoes of the prior mortgagee but is to be taken as clearing the property from prior incumbrances for the benefit of the later mortgagee.

Now quite apart from the general law on the subject, the decree of the High Court, from which there was no appeal, had provided that in respect of any payment made by the owner of the property to the second mortgagee he should acquire the right of the second mortgagee. This would be sufficient for the determination of the question immediately in dispute, because the sum in Court, rupees 1,327 odd,is less than the sum of rupees 1,990 which the respondents paid to the second mortgagee when final satisfaction was entered. And accordingly the Subordinate Judge had no difficulty in deciding the immediate application in favour of the respondents.

From this decision the present appellant appealed to the High Court at Madras. This Court, in affirming the actual decision, went further and stated a principle in accordance with which the present respondents will not only be entitled to stand in the shoes of the second mortgagee in respect of rupees 1,990, paid at the time of the final satisfaction, but also in respect of several payments that they or Pingales had made from time to time to save the crops from being seized. This question, as the Judges in the High Court rightly pointed out, was not determined by the previous decree of the High Court, which only affected payments made subsequent to that decree.

It is therefore necessary to investigate matters a little more closely. It is now settled law that where in India there are several mortgages on a property, the owner of the property subject to the mortgages may, if he pays off an earlier charge, treat himself as buying it and stand in the same position as his vendor or to put it in another way, he may keep the incumbrance alive for his benefit and thus come in before a later mortgagee. This rule would not apply if the owner of the property had covenanted to pay the later mortgage debt, but in this case there

P. C.
Mallireddi Ayyareddi v. Adusumilli Gopala krishnayya.
Lord Phillimore.

was no such personal covenant. It is further to be presumed, and indeed the statute so enacts (Transfer of Property Act, S. 101), that if there is no indication to the contrary the owner has intended to have kept alive the previous charge if it would be for his benefit.

So far therefore as Pingala or the respondents can be supposed to have bought the rights of the second mortgagee at the various times when they paid sums to him, so far they are entitled to stand in his shoes and claim priority over the present appellant, who is the third mortgagee. This could hardly be disputed by counsel for the appellant, having regard to the decisions of this Board. [*Gokuldoss Gopaldoss* v. *Rambux Seochand* (1), *Dinabandu Shaw Chowdhry* v. *Jogmayi Dasi* (2) and *Mahomad Ibrahim Hossein Khan* v. *Amrika Pershad Singh* (3) The point, however, on which he really relied arose under the peculiar conditions of the second mortgage, which was upon the crops as well as upon the land. He contended that sums paid to the second mortgagee to save the crops from seizure must be deemed to be sums paid in reduction of the second mortgage, and not purchases *pro tanto* of that mortgage.

Their Lordships fail to follow the contention. There was an incumbrance upon a composite security, land and crops. It became necessary for the owner subject to the incumbrance, to pay sums of money to the incumbrancer to prevent his enforcing his charge from time to time. The incumbrancer could sell his charge or portions of his charge to anyone, and there is nothing in law or good sense to eliminate the owner of the property from the list of possible purchasers. It is to the benefit of the owner that the proceedings should be deemed to be a purchase and not a redemption, and no reason appears why it should not be assumed that he intended to act in the way most beneficial to himself.

If instead of the mortgage being on lands and crops it had been on three separate estates, and proceedings had been taken against one of them only, money paid to stave off such proceedings might certainly be considered to be purchase money and not redemption money. So in the case of these crops. Any sums paid by Pingala or the respondents to save the sale of crops should be deemed to be *pro tanto* purchases of the second mortgage. It is suggested by the appellant that the sum of rupees 2,058 odd received in April, 1914, was not paid by Pingala but

1. L R 11 I A 126. 2. (1901) L R 29 I A 9 : 12 M L J 73 (P C).
3. (1911) L R 39 I A 68 : 22 M L J 468 (P C).

was the fruits of a sale in execution. If this should prove to be so, and there is nothing to qualify it, the present respondents would not in respect of that sum be entitled to stand in the shoes of the second mortgagee. But in all cases where they have paid the money, they are entitled to the benefit. A *fortiori* they are entitled to keep the order made in their favour by the Judge of the Subordinate Court and confirmed by the High Court, and to have the money in Court paid out to them. Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed wth costs.

P. C.
Mallireddi Ayyareddi *v.* Adusumilli Gopala krishnayya.
Lord Phillimore.

Solicitor for the appellant : *E. Dalgado.*

Solicitor for the respondents : *H. S. L. Polak.*

K. V. L N. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

K. V. Kore, since deceased *Appellant*.*

v.

The Municipal Corporation of Bombay and another *Respondents.*

(On appeal from the Bombay High Court).

P. C.
Kore *v* Municipal Corporation of Bombay.

Bombay Municipality—Lands required for street improvements—Acquisition—Contiguous land—City of Bombay Municipal Act (1888), *S.* 296, 91.

Under the City of Bombay Municipal Act (III of 1888), the Bombay Municipality has the power to acquire lands, not only for the purpose of widening the streets, but also to take extra land contiguous to the widened street, even if the latter was intended to be leased or re-sold for profit.

Trustees for the improvement of Calcutta v. *Chandra Kanta Ghosh,* L. R. 47 I A 45 applied.

Decree of the High Court affirmed.

Appeal (No. 61 of 1922) from a decree of the Bombay High Court, made in suit No. 2339 of 1920.

The appellant on behalf of the owners of certain house property in the Mahim District of Bombay instituted the present action against the respondents (Municipal Corporation of Bombay and its Commissioner) for a declaration that the latter were not entitled

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*P. C. Appeal No. 61 of 1922. 19th October, 1923.

P. C.

Kore v. Municipal Corporation of Bombay

to acquire compulsorily the property of the appellant as it was not actually required to widen the public street. The defence was that the respondents were so entitled under S. 295 of the City of Bombay Municipal Act, III of 1888.

A Division Bench of the High Court held in favour of the respondents and dismissed the suit. Hence the present appeal.

The facts and the material sections of the Act are set out in their Lordships' Judgment.

1923. Oct., 19. *De Gruyther, K. C.* and *Brown* for the appellant.

Lowndes, K. C. and *Raikes* for the respondent.

1923. Oct. 19. The Judgment of their Lordships was delivered by

Lord Dunedin.

Lord Dunedin :—In this case the question arises upon what is proposed to be done by the Municipality of Bombay in connection with a projected improvement of a public street. The municipality propose in improving a certain street, not only to widen it, but to take a certain amount of extra ground contiguous to, but beyond, the actual limits of the widened street, with the avowed intention of erecting new buildings thereon and afterwards reselling the land with the buildings upon it. The powers of the municipality with regard to this matter are dealt with in S. 296 of the City of Bombay Municipal Act, 1888, which is as follows :—

"(1) The Commissioner may, subject to the provisions of Ss. 90, 91 and 92—(*a*) acquire any land required for the purpose of opening, widening, extending or otherwise improving any public street or of making any new public street, and the buildings, if any, standing upon such land ; (*b*) acquire, in addition to the said land and buildings, if any, standing thereupon ; all such land, with the buildings, if any, standing thereupon, as it shall seem expedient for the corporation to acquire outside of the regular line, or of the intended regular line, of such street ; (*c*) lease, sell, or otherwise dispose of any land or building purchased under cl. (*b*)."

Reference has been made to certain cases, but it is perfectly clear that in cases of this sort each must be determined upon its own circumstances, and its circumstances consist first and foremost of the precise terms of the Act in question and, secondly of the thing which is proposed to be done. In one sense no other case is an authority ; but at the same time certain principles have been very clearly laid down by this Board in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1). In that case what was proposed

1. L R 47 I A 45.

P. C.

Kore v. Municipal Corporation of Bombay.

Lord Dunedin.

to be done was similar to what is proposed to be done in the present case, that is to say, the land was going to be acquired for the purposes of future sale and, if prices realised their expectancy, part of the expense to which the municipality had been put would be recouped. S. 42 of the Calcutta Improvement Act, 1911, provided :—

"Any improvement scheme may provide for—(*a*) the acquisition by the Board of any land, in the area comprised in the scheme, which will, in their opinion, be affected by the execution of the scheme."

Lord Parmoor, in delivering the judgment of their Lordships, says this at page 53 :—

"It is not immaterial to observe that there was at the date of the passing of the Calcutta Improvement Act no novelty in the recoupment principle."

Then he cites *Galloway* v. *London Corporation* (2) and continues :—

"But whether this principle has been sanctioned in the Calcutta Improvement Act must be determined on the language used, and the case of *Donaldson* v. *South Shields Corporation* shows, if authority is necessary, that where an Act authorises land to be taken for the actual works only, a local authority, or other public body, will be restrained from taking more than is actually necessary for such words."

Their Lordships have no doubt that that is the correct principle. One, therefore, has to find in the Act something more than the mere possibility of acquiring land for the purposes of the improvement where it is proposed to do what is proposed to be done in this case. When their Lordships come to this Act they find that the case is *a fortiori* of the *Calcutta Case*. It appears to their Lordships that it is clear beyond all doubt, not only that the Municipality may acquire land for the purpose of making a street, but that they may acquire, if it seems expedient, land outside the regular line of such street. If the matter had ended there it might have been said that the land outside the street was only meant to form an appendage to such street; but then comes cl. (*c*) which says: that they may "lease, sell, or otherwise dispose of any land or building purchased under cl. (*b*)." This seems to their Lordships to point to recoupment with almost the greatest certainty that could be expressed in words. The powers no doubt are drastic, but they are not altogether untrammelled, because when S. 91, which is one of the sections to which S. 296 is subject, is looked at, it is found that if the Commissioner is unable to acquire any property by agreement Government may in their discretion upon

2. (1866) L R 1 H L 34.

P. C.

Kore v. Municipal Corporation of Bombay.

Lord Dunedin.

the application of the Commissioner made with the approval of the Standing Committee order proceedings to be taken for compulsory acquirement ; so that in the discretionary power of the Government would always be found a certain limitation over and above the limitation which their Lordships think necessarily follows from the fact that what is done must be done in the course of making or widening the street, for it appears to their Lordships that the municipality certainly could not take land which was not in contiguity. Their Lordships think that this result would follow notwithstanding any of the somewhat more vague words which are used in the earlier sections of the Act.

In these circumstances their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for the appellants : *Hughes and Sons.*

Solicitors for the respondents : *Sanderson, Orr and Dignams.*

K. V. L. N. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(On appeal from the Madras High Court).

Ohala Kondama Naicker and another *Appellants**

v.

Kandasawmi Gounder *Respondent.*

P. C.

Ohala Kondama Naicker v. Kandasawmy Gounder.

Hindu Law—Limited owner—Alienation by way of compromise—Transferee for value from alienee—Reversioner's suit—'Necessity'—Burden of proof.

Under Hindu Law, a limited owner can dispose of the inheritance only for legal necessity, the burden of proving its existence being on the alienee. It is immaterial that the absence of necessity is not pleaded by the reversioner.

Sham Sunder Lal v. *Achhan Kunwar,* L R 25 I A 191 applied.

An alienee may be protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed, even though there may not be legal necessity in fact.

After the limited owner's death, the reversioner may treat the alienation as a nullity without the intervention of Court. *Bijoy Gopal Mukerji* v. *Kishore Mahishi Debi,* L. R. 34 I. A. 87 17 M. L. J. 154 (P. C.) referred to.

A transferee for value from the alienee cannot get a better legal title than his transferor had.

Decree of the High Court reversed.

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*P. C. Appeal No. 2 of 1922. 13th November, 1923.

P. C.

Ohala Kondama Naicker v. Kandasawmy Gounder.

Appeal (No. 2 of 1922) from a decree of the Madras High Court, varying a decree of the Subordinate Judge of Madura.

The appellants instituted the present action for a declaration that the compromise entered into by their mother was not valid and binding on them as reversioners of their grandfather. The defence of the respondent was that the compromise was a *bona fide* settlement of family disputes and that, even if otherwise, he, as a *bona fide* purchaser for value and without notice, was protected.

The trial Judge held that the compromise was valid and binding on the appellants and dismissed the action. On appeal, the High Court was not satisfied with the way in which the trial Court arrived at its findings and remitted the issues for fresh findings. The successor of the original trial Judge came to the conclusion that the compromise was not valid, having been brought about by the fraud and undue influence of the respondent's transferor. The High Court accepted the later finding but held that the respondent was however protected under the Indian Trusts Act. The Court varied the decree of the trial Court as regards defendants other than the respondent and affirmed it as regards him. Hence the present appeal.

1923. Oct., 19, 22. *De Gruyther, K. C.* and *Brown* for appellants : The Indian Courts concurrently found that the compromise was induced by fraud on the part of the respondent's transferor. They therefore set aside the compromise wholly. Respondent's transferor had no title to the property and he could not confer a better title on his transferee. The Indian Trusts Act was wrongly applied by the High Court to the facts of the case. Under the Hindu Law, appellant's mother can dispose of the inheritance only for legal necessity. The burden of proving the existence of necessity is on the alienee. *Sham Sundar Lal* v. *Achhan Kunwar* (1). The transaction is otherwise avoidable by the reversioner. *Madhusudan Singh* v. *Rooke* (2). On the death of the limited owner, the reversioner can elect to treat the transaction as valid or not. For the same purpose, a declaratory suit may be instituted during the limited owner's lifetime. [*Gunjeshwar Kunwar* v. *Durga Prasad Singh* (3) was also referred to]. The

1. L R 25 I A 191. 2. L R 24 I A 164.
3. (1917) L R 44 I A 229 : 34 M L J 1.

P. C.
Ohala Kondama Naicker v. Kandasawmy Gounder.

reversioner may treat the transaction as a nullity without the intervention of the Court. *Bijoy Gopal Mukerji* v. *Kishore Mahishi Debi* (4).

Sir William Finlay, K. C. and *Narasimham* for the respondent : Under the Hindu Law, a compromise by a limited owner stands on a different footing from an alienation. *Khunni Lal* v. *Gobind Krishna Narain* (5). Compromises of doubtful claims in a litigation are not affected by the doctrine of legal necessity. It is often held by the Board that a Hindu woman has the power to compromise. *Ram Sumran Prasad* v. *Gobind Das* (6). Absence of necesity was not alleged in the plaint. There is no evidence that the respondent had notice of the defect in title of his transferor. Both the Indian Courts were in favour of the respondent on this point. The trial Judge held that the compromise was valid and binding, on an elaborate consideration of all the facts in the case. The High Court was wrong in remitting the issues for fresh findings. The High Court's power in this direction is limited by the provisions of the Civil Procedure Code (1908), O. 41, R. 25. It is so held by this Board. *Venkata v. Ananta* (7).

1923. Nov., 13. The Judgment of their Lordships was delivered by

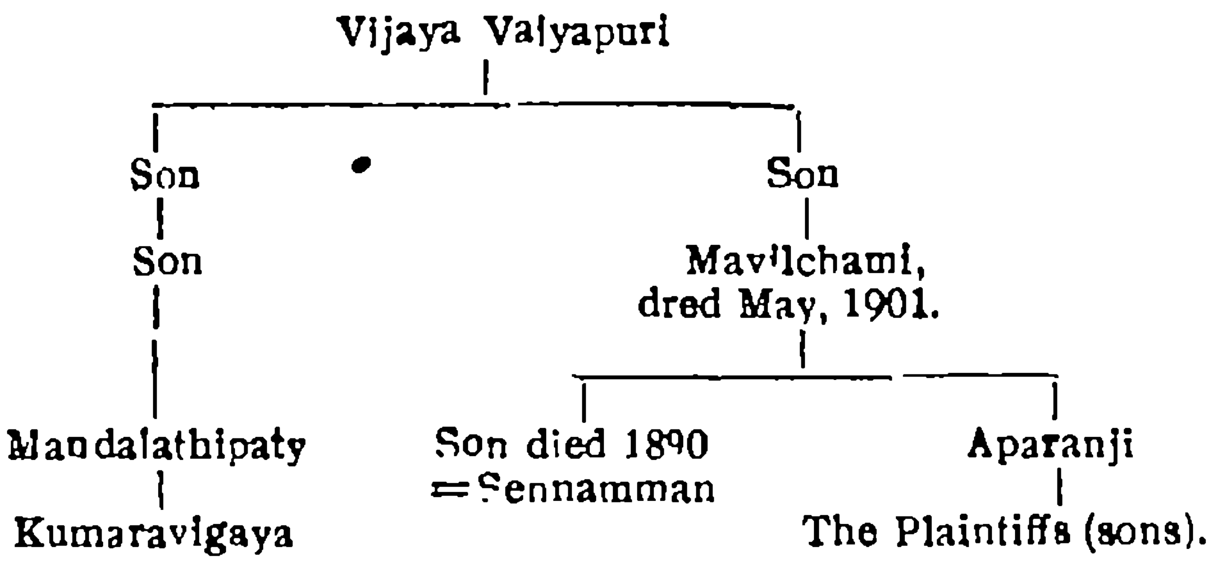
Sir Lawrence Jenkins.

Sir Lawrence Jenkins :—This is an appeal from a decree of the High Court of Judicature at Madras, dated the 2nd May, 1919, which varied a decree of the Subordinate Judge of Madura, dated the 23rd December, 1916. The plaintiffs are the reversionary heirs of their maternal grandfather Mayilchami, who died in May, 1901, and was succeeded by his daughter, Apranji Amman, the mother of the plaintiffs. The defendants (among others) Aparanji Amman, Kumaravigaya, the son of the late Mandalathipathy, Sennamman Avergal, and Kandasamy Goundar.

The purpose of the suit is to establish the plaintiffs' title as reversioners.

To explain this title it will be convenient to set out the following pedigree :—

4. (1906) L R 34 I A 87 : 17 M L J 154 (P C).
5. (1911) L R 38 I A 87 21 M L J 645 (P C).
6. (1922) L R 49 I A 387 : 44 M L J 751 (P C).
7. I L R 16 M 299.



On Mayilchami's death Sennamman commenced proceedings under the Criminal Procedure Code for possession of the estate of her father-in-law. Her application substantially failed. She then instituted a suit on the 14th February, 1902, against Aparanji and Mandalathipathy seeking to establish a will alleged by her to have been executed by Mayilchami and praying that possession should be given to her of one-third share of the property left by him.

Both defendants to that suit filed written statements and the litigation closed with a compromise in 1903.

It provided that 10 kulies of the property therein described and a house should be delivered by the defendants to Sennamman. To this extent it was within the scope of the suit, and ultimately a decree was passed in accordance with this stipulation.

But the compromise also purported to define the rights of the defendants to that suit as between themselves. By cl. 8 it provided that the properties described in the plaint (other than what was given to Sennamman) should be divided into moieties and that each of those defendants should take one. On the 23rd February, 1907, a partition deed was executed in accordance with the terms of the compromise. On the 2nd July, 1910, Mandalathipathy executed a mortgage on property taken by him under the compromise to secure Rs. 10,000 advanced to him by the respondent Kandasamy Goundar, and on the 7th January 1915, a decree for Rs. 17,257 was passed on it in the mortgagee's favour.

The plaintiffs, as reversioners under their maternal grandfather have instituted this suit on the 2nd March, 1915, seeking to establish the invalidity as against them of the respective titles claimed by Kumaravigaya, the son of Mandalathipathy, deceased, and by the mortgagee.

It has been held by the High Court, and their Lordships adopt the finding, that Mayilchami and Mandalathipathy were

P. C.

Ohala Kondama Naicker *v.* Kandasawmy Gounder

separate and not joint, and there can be no doubt that this was known to Mandalathipathy at the time of the compromise.

But the compromise was based on the supposition that there was a question as to whether there had been a separation between the two lines of the family.

The High Court has further found that there is no evidence that Aparanji, with full knowledge that there was no truth in the claim put forward by Mandalathipathy, agreed to the compromise from ulterior motives and that there is not sufficient evidence to show that in assenting to the terms of the compromise she was not acting bona fide in the light of the circumstances then brought to her notice. Their Lordships do not dissent from this appreciation of the evidence. Aparanji at the time of the compromise stood in need of especial protection. She was a purdanashin lady recently widowed, the mother of infant sons, and, so far as the evidence discloses, without any adult male relation except Mandalathipathy to advise her.

But it was under his advice and influence that she acted in the litigation with Sennamman and in the compromise by which Mandalathipathy took to the detriment of herself and her infant sons the benefits to which, as he well knew, he had no honest claim.

In these circumstances the High Court rightly came to the conclusion that as against defendant No. 2 Mandalathipathy's son and heir, the plaintiffs established the invalidity of the compromise after their mother's death. From this part of their adjudication no appeal has been preferred, and the only contest now is with the mortgagee in whose favour the High Court decided.

The ground of this decision is that the mortgagee is a *bona fide* transferee for value, and so stands in a better position than his transferor, whose title was held to be bad.

The High Court appears to have thought that justification for this view was to be found in the provisions of the Trust Act. In their Lordships' opinion this was erroneous : the Act has no direct relevance to the circumstances of this case, and it was properly realized in the argument here that if the High Court's conclusion can be supported it must be on other grounds.

It has thus been contended that the High Court acted without jurisdiction in remanding the case as it did, and that the true view of the facts is that taken by the first trial judge. But though the High Court's procedure may invite criticism, this is of no

P. C.

Ohala Kondama Naicker v Kandaswmy Gounder.

Sir Lawrence Jenkins.

importance in view of that Court's ultimate findings of fact which, as already indicated, their Lordships accept.

They therefore do not think it necessary to discuss further the propriety of the remand.

It is then contended that the plea of purchaser for value without notice assists the respondent.

But an initial difficulty in applying this doctrine is that on the face of the title the mortgagee had notice that his mortgagor took from one who only had a limited and conditional power of disposal. And so the enquiry comes back to this : what was the daughter's interest and power, bearing in mind that the case comes from the Madras Presidency ? It is now settled beyond dispute that a daughter as heiress of her father takes a restricted interest similar to that taken by a widow with a similar power of disposal. This power is conditional ; she can dispose of the inheritance for legal necessity, but it lies on the alienee to prove the existence of this necessity, and this is so even though the absence of necessity be not pleaded by the reversioner. Thus it was laid down in *Sham Sunder Lal* v. *Achhan Kunwar* (1) " In a suit like the present, on a bond made by a person with restricted power of alienation, the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to allege and prove the circumstances which alone will give validity to the mortgage." And later it was said the " touchstone of the authority is necessity." It may be conceded that even though there may not be legal necessity in fact, the alienee would be equally protected if he honestly did all that was reasonable to satisfy himself that the required necessity existed.

But here there is no proof either of necessity or of enquiry validating the compromise.

The inheritance therefore was not transferred so as to bind the reversioners. On the contrary, the reversioners on the mother's death can treat it as a nullity without the intervention of any Court. (*Bijoy Gopal Mukerji* v. *Kishore Mahishi Debi* (2).)

Nor in their Lordships' opinion does it alter the position that the dealing with Mandalathipathy purported to be a compromise and an acknowledgment of an existing title. Even so, it was improperly induced and equally vitiated.

1. L R 25 I A 191. 2. L R 34 I A 87.

P. C.

Ochala Kondama Naicker v. Kandasawmi Gounder.

Sir Lawrence Jenkins.

As against the reversioners in this case, it was not within the power of Mandalathipathy to transfer a larger legal title than he himself had, nor have the reversioners by any act or omission debarred themselves from insisting on this contention. It is true that the reversion is still an expectancy, but an expectant reversioner's right to sue for a declaration has statutory recognition, and for the purpose in hand it is legitimate to consider what their position would be on their mother's death in their lifetime. They would in that event have the immediate title without the intervention of any Court, and there would in their Lordships' view be no principle of justice, equity or good conscience that would empower the Court to deprive them of that legal title or to impose any restriction in derogation of it.

Their Lordships therefore are unable to agree with the High Court's decision in the mortgagee's favour, and they will accordingly humbly advise His Majesty that the appeal be allowed, and that the decree of the High Court be varied so far as it dismissed the appeal as against the 4th defendant and ordered that the plaintiff should pay to the 4th defendant Rs. 621-2-6 for his costs, by directing in lieu thereof (*a*) that it be declared that the mortgage of the 2nd July, 1910, and the decree thereon are inoperative against the plaintiffs beyond their mother's lifetime, and (*b*) that the 4th defendant pay to the plaintiffs their costs in the lower Courts so far as attributable to his claim against them, the amount of such costs to be assessed by the High Court. The 4th defendant must pay to the plaintiffs their costs of this appeal.

Solicitor for appellants *Douglas Grant.*

Solicitor for respondent *E. Dalgado.*

K. V. L. N. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Sami Chetti (died) and another *Appellants** (*1st Respondent and his L. R.*).

Adaikkalam Chetti and another *Respondents* (*Petitioner and 2nd respondent*).

Sami Chetti v. Adaikkalam Chetti.

Civil Procedure Code O. 22 R. 1—Guardianship —Death of appellant pending appeal against order appointing a guardian —Right of legal representative to continue the appeal —Appointment of guardian by reference to arbitration—— Legality of.

Against an order of Court appointing a particular person as guardian of a minor, the minor's paternal uncle who opposed the appointment in the lower Court, preferred an appeal. On the death of the appellant pending the appeal, his son sought to continue the appeal. Objection was taken that the right to sue did not survive and the appeal abated. *Held* that the appeal did not abate and could be prosecuted by the son of the deceased appellant.

Ganga Bai v. *Kasha Bai* I. L. R. 23 B 719 distinguished.

In proceedings for the appointment of a guardian for a minor, the Court appointed as guardian a person selected by certain arbitrators chosen by the parties without arriving at any independent conclusion as to his fitness for the appointment. *Held* that the order was unsustainable. The matter was not of private interest between the parties and could not be settled by a reference to arbitration.

Mahadeo Prasad v. *Bindeshri Prasad* I L R 30 A 137 followed.

Appeal against the order of the District Court of West Tanjore in O. P. No. 87 of 1920 dated 6th October 1922.

K. Bashyam Iyengar for appellants.

S. G. Ramanujam and *K. Sankarasastri* for respondents.

The Judgment of the Court was delivered by

Waller J :—This is an appeal against an order of the District Judge, West Tanjore, appointing one Adaikalam Chetti as guardian of his minor nephew. Adaikalam Chetti was the applicant in the guardianship petition, which was opposed by Sami Chetti the minor's paternal uncle. The latter appealed, but died during the pendency of the appeal. His son was brought on record as his legal representative and seeks to prosecute the appeal. Objection is taken that the right to sue does not survive and that the appeal has abated.

The objection is based on the decision in *Gangabai* v. *Khashabai* (1). The facts of that case were, however, very different from those with which we are now concerned. The appellant

*A. A. O. No. 422 of 1922. Dated 29th November, 1923.

1. I. L. R. 23 B. 719.

Sami Chetti v Adaikkalam Chetti.

there relied on a personal appointment as guardian under a will and her brother, after her death applied for leave to prosecute her appeal. It was held that a claim based on a personal trust did not survive. As Parsons C. J. observed "It cannot be said that the right to sue, which in this case must be construed to mean the right to make the objection which Ganga Bai made, survived," Ranade, J. also pointed out that the brother could not succeed as he claimed no right under the will.

On the other side has been cited a decision of a single Judge of the Punjab Chief Court who allowed the son of a deceased appellant to prosecute an appeal of this kind [*Arjan Singh* v. *Gujri* (2)]. In that case the appellant had asked to be appointed guardian as a reversioner. In the present case Sami Chetti opposed the application of the minor's maternal uncle on the ground of his own superior claim as the undivided senior paternal uncle. I see no reason why in the language of Parsons, C. J., the right to make that objection should not be held to have survived in favour of his legal representative. A guardianship application is, after all, not a suit *inter partes*. It is a proceeding designed to satisfy the Court that it is for the welfare of a minor that a guardian should be appointed and as to the most suitable person for appointment. The application may be made by (among others) any relative or friend of the minor and the Judge may issue notice of it not only to certain specified persons, but also to any other persons to whom, in his opinion, special notice should be given. The welfare of the minor is the paramount consideration and it would, I think, be most unfortunate to hold that an appeal against an unsuitable or illegal appointment abated on the death of one of the persons who has received special notice of the application. Here the nearest male relation had filed an appeal objecting to the appointment and I think that the right to make that objection survives to his legal representative. I therefore over-rule the preliminary objection.

On the merits it appears that the parties agreed that the selection of the guardian should be left to certain arbitrators who chose Adaikalam Chetty. Their choice seems to have been accepted by the Judge. In *Mahadeo Prasad* v. *Bindeshri Prasad* (3) it has been held that such a matter. which is not of private interest between parties, cannot be settled by a reference to arbitrators. This ruling I respectfully follow. The law

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2. (1917) 42 I. C. 410.
3. I. L. R. 30 A. 137.

allows a reference to arbitrators where all the parties interested agree that the subject of difference between them shall be so referred. In a guardianship application the party most interested is the minor and he cannot agree to a reference. There is nothing on record to show that the Judge arrived at any independent conclusion as to Adaikalam Chetti's fitness for appointment. Under the circumstances, I think that his order must be set aside and that he must be directed to dispose of the application afresh. I do this with great reluctance. It is quite likely that Adaikalam Chetti is the proper person to be appointed and this litigation has been going on since March 1920. As appellant agreed to the reference, there will be no order as to costs. Sami Chetti v. Adaikkalam Chetti.

Krishnan, J., :— I agree.

A. V V *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE ODGERS.

Natesa Pillai *Appellant* (Petitioner).*

Kannammal Anni and others *Respondents (Respondents Nos. 1, 2, 4, 5 and 7 to 15)*

Civil Procedure Code O. 22 R. 3 and O. 34 R. 2 —Mortgage suit —Death of plaintiff after preliminary decree—Abatement—Application for final decree—Limitation. Natesa Pillai v. Kannammal Anni.

Where after the passing of the preliminary decree in a mortgage suit, the plaintiff dies and his legal representative is not brought on record within the time prescribed by law, the suit abates ; and the legal representative cannot obtain a final decree without setting aside the abatement.

Lakshmi Achi v. *Subbaiama Iyer* (1915) 39 M 488 : 28 M. L. J. 491.

Subbarayudu v. *Ramdasu* (1921) 42 M. L. J. 301 followed.

Civil Miscellaneous Second Appeal against the order of the Court of the Subordinate Judge of Negapatam in A. S. No. 33 of 1920, preferred against the order of the Court of the District Munsif of Negapatam in I. A. No. 1639 of 1918 in O. S. No. 97 of 1912.

K. S. Champakesa Iyengar for appellant.

S. Ramaswami Iyer and *T V. Ramanatha Iyer* for respondents.

The Court delivered the following

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*A. A. A. O. No. 71 of 1921. Dater 11th September 1923.

Netasa Pillai v Kannammal Anni.

JUDGMENT :—The appellant claims to be the legal representative of the plaintiff, who obtained a preliminary decree in a mortgage suit in O. S. No. 97 of 1912.

The plaintiff admittedly had died before this appellant applied on November 29th, 1915 to be recognised as the heir of the plaintiff and to get a final decree passed.

His application was dismissed on February 9th 1916 on acount of his absence.

As he did not get himself brought on the record at that time, the suit abated under O. 22, R. 3 of the Code of Civil Procedure upon 6 months expiring after the plaintiff's death;and as he did not apply subsequently to have the abatement set aside, the present application presented on October 10th, 1918 is out of time and incompetent.

It is true that the District Munsif erroneously held that the suit had not abated because the plaintiff's death occurred between the passing of the Preliminary and the final decrees.

But this Court has held in *Lakshmi Achi* v. *Subbarama* (1) that the suit is continued till the stage of final decree is reached. See also *Subbarayadu* v. *Ramadasu* (2), which is a direct authority for holding that after the abatement of the suit, an application to pass a final decree, which is not made within the time provided by law, should be dismissed as time barred.

This Civil Miscellaneous Second Appeal is therefore dismissed with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Subbayya Chakkiliyan *Appellant** (*1st Defendant*).

v.

Maniam Muthiah Goundan and another *Respondents* (*Plaintiff and 2nd defendant*).

Subbayya Chakkiliyan v. Muthiah Goundan.

Deed —Construction —Sale Certificate —Conflict between boundaries and area —Rights of purchaser.

Ordinarily when a piece of land is sold with definite boundaries, unless it is clear from the circumstances surrounding the sale that a smaller extent than what is covered by the boundaries was intended to be sold,

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*S. A. No. 1587 of 1922 22nd November 1923.

1. (1915) I L R 39 M 488 : 28 M L J 491. 2. (1921) 42 M L J 301.

Subbayya Chakkiliyan v. Muthiah Goundan.

the rule of interpretation is that boundaries must prevail as against the measurements. *Held* on a construction of the sale certificate in the case, that the whole of the lands within the specified boundaries was meant to be sold notwithstanding an inaccurate statement of the extent.

Second Appeal against the decree of the District Court of Coimbatore in A. S. No. 89 of 1922 presented against the decree of the Court of the Additional District Munsif of Coimbatore in O. S. No. 78 of 1921 (O. S. No. 316 of 1919, Principal District Munsif's Court).

K. V. Sesha Iyengar and *T. Sundara Rao* for appellant.

S. Ranganatha Iyer for respondents.

The Judgment of the Court was delivered by

KRISHNAN, J. :—The question that has been raised before us is what exactly is the land that was purchased in Court-auction under Ex. II, the Court sale certificate. This certificate describes the land in the following terms :—

" In Coimbatore district, Ganapathi Sub-District, Coimbatore Taluq, Annuparapalayam village, situate to the north of the east to west main road, west of Venkataswami Goundan's House, south of the temple and east of Kaliannan's land ; lying within these and belonging to the defendant measuring 12 cubits east to west and 24 cubits north to south, together with 1 thatched shed herein " It was contended before the lower appellate Court and that Court has given effect to that contention, that what was sold was only the *extent* mentioned in the land falling within the boundaries given and not the whole of the land within those boundaries. It is not pretended that the whole of the land within the boundaries mentioned did not belong to the judgment-debtor ; but, because the measurements given are smaller than the measurements as taken now it is claimed by the plaintiff's temple that all the land within the four boundaries mentioned in the above description over and above 12 cubits east to west and 24 cubits north to south still belong to them and not to the 1st defendant who claims under the auction-purchaser. We are unable to agree with the construction put upon this sale certificate by the learned District Judge.

It seems to us to be quite clear that what was actually sold was the whole of the land within the boundaries and that the measurements were not accurately given, the mistake being in the measurements alone. Ordinarily when a piece of land is sold with definite boundaries, unless it is very clear from the circumstances surrounding the sale that a smaller extent than

Subbayya Chakkiliyan v. Muthiah Goundan.

what is covered by the boundaries was intended to be sold, the rule of interpretation is that boundaries must prevail as against the measurements. There is no reason to suppose that, when the judgment-debtor was putting up the property for sale in execution of his money decree, he was reserving any portion of the property to be left to his judgment-debtor and settling only a portion of the property belonging to him. The property is a single property forming one block on the Avanasi Road. We think that all the circumstances point to the whole of the property within the boundaries having been sold. We agree with the District Munsif in his construction of the sale certificate and set aside the decree of the District Judge and restore that of the District Munsif with costs in this and in the lower appellate Court.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

Kavali Sankara Rao Garu *Appellant* (Petitioner-10th Creditor).*

v.

Turlapati Ramakrishnayya and others *Respondents (Respondents).*

Kavali Sankara Rao v. Ramakrishnayya.

Provincial Insolvency Act (V of 1920), Ss. 58, 59 (c) and (e), 68 and 80—Transfer of insolvency petition to Official Receiver for disposal no vesting order—Sale of properties by Official Receiver—Setting aside—Limitation.

On a petition by a debtor to be adjudicated an insolvent the District Court made an order transferring it for disposal to the Official Receiver. The Official Receiver made an order of adjudication. There was no order of the District Court vesting the properties of the insolvent in the Official Receiver. Nevertheless the Official Receiver purported to sell the properties of the insolvent in the course of administration. A creditor of the insolvent applied to set aside the sale more than 21 days after the date of the sale and it was contended that the application was barred by S. 68 of the Provincial Insolvency Act. *Held,* (1) that the Official Receiver had no right to deal with the properties of the insolvent without an express vesting order of the District Judge ; (2) that the indorsement made by the Judge on the insolvency petition was not tantamount to vesting the property of the insolvent in the Official Receiver ; (3) that a vesting order could validly be made only after adjudication ; (4) that the sale in the present case was made by a person not authorised by law and was therefore

*A A O Nos. 56, 57 and 58 of 1922. 12th October, 1923.

Kavali Sankara Rao v. Ramakrishnayya

void ; and (5) that S. 68 of the Provincial Insolvency Act which presupposed a decision by a Receiver properly appointed did not bar the present application.

Vythilinga Padayachi v. *Ponnusami Padayachi* 41 M L J 78 ; *Muthusami Swamiar* v. *Somoo Kandiar,* 39 M L J 438 : 43 M 869 ; *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar,* 30 M L J 415 followed.*

Subba Aiyar v. *Ramaswami Aiyangar,* 44 M 547 : 40 M L J 209 distinguished.

Appeals against orders of the District Court of Kistna in I. A. Nos. 191 of 1921, 192 of 1921 and I. A. No. 939 of 1919 in I. P. No. 20 of 1919.

A. Krishnaswami Aiyar for appellant.

V Visvanatha Sastri and *V Suryanarayana* for respondents.

The Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.* :—These are three appeals by two creditors of one Ramakrishnayya, an insolvent, who sought to get set aside by the lower Court two sales by the Official Receiver of Kistna, of two items of properties belonging to the insolvent. Their applications were dismissed by the learned District Judge on the ground that it was out of time under S. 68 of the Provincial Insolvency Act, the applications having been filed more than 21 days from the date of the two sales.

In appeal it is argued before us by the learned Vakil for the creditors that S. 68 does not apply to this case as the sales cannot be considered to have been made by a properly authorised Receiver, but by some one who had no power to deal with the properties. The argument is that, after the adjudication of the insolvent in this case, no order vesting the property of the insolvent in the Official Receiver was made, and without such an order the Official Receiver gets no right to deal with the insolvent's properties. What happened in this case was, when the insolvency petition was filed by the insolvent in the District Court, the District Judge made an endorsement on that petition that it was " transferred for disposal to the Official Receiver. " It is not denied by the other side that the District Court made no further orders in the case. The Official Receiver has been authorised under S. 80 to hear an insolvency petition and make the order of adjudication but under that section, the power to make the vesting order is not delegated to the Official Receiver ; and it is clear from the authorities which have been cited before us, *Vythilinga Padayachi* v.

Kavali Sankara Rao v. Ramakrishnayya

Krishnan, J.

Ponnuswami Padayachi (1), *Muthuswami Swamiar* v. *Somookandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3), that the Official Receiver does not get a right to deal with the properties of the insolvent without an express vesting order by the District Judge. Such an order has to be made under the Act by the District Judge after the adjudication of the insolvent. It is, therefore, quite clear that the argument that the endorsement made by the Judge on the insolvency petition is tantamount to vesting the property of the insolvent in the Official Receiver cannot be accepted. I agree with my learned brother that the wording of the order itself does not convey the idea of any vesting at all. The order in the case cannot be taken to include a vesting order made in anticipation of the adjudication of the insolvent ; for even if we suppose that the District Judge meant, when he transferred the insolvency application to the Official Receiver. to make him the receiver of the properties it would be illegal. There is thus a difficulty in the way of the respondents. We must take it that the sales in the present case were made by a person who was not authorised to sell and are thus invalid. In a case like that, it is impossible to hold that the limitation under S. 68 will apply as S. 68 presupposes that the decision is by a receiver properly appointed. It follows, therefore, that the three appeals must be allowed, the two sales must be set aside, and the cases sent back to the District Judge for a proper vesting order being made and further proceedings in insolvency conducted thereafter. The petitioners-appellants are entitled to their costs in this Court and in the Courts below to be paid from the insolvent's estate.

Odgers, J.

Odgers, J. :—These are appeals against the order of the District Judge of Kistna on an application by two creditors of an insolvent called Thurlapati Ramakrishnayya praying to set aside two sales by the Official Receiver held on 27th August, 1919 and 26th February, 1920. The District Judge held the application out of time as having been made more than 21 days after the sales. The Court on the application of Thurlapati Ramakrishnayya to be adjudicated an insolvent passed the following Order :—

"Transferred to the Official Receiver, Kistna, for disposal," and it is contended by the respondent that this has the effect of

1. (1921) 41 M L J 78. 2. (1920) I L R 43 M 869 : 39 M L J 438.
3. (1916) 30 M L J 415.

Kavali Sankara Rao v. Rama-krishnayya

Odgers, J.

transferring the whole matter to the Official Receiver and thus of incidentally appointing him Receiver of the insolvent's property. This contention is necessary in face of the following decisions *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) which held that the property of an insolvent does not *ipso facto* vest in the Official Receiver but an order must be passed in every case appointing a Receiver and that failure to do this entails as a consequence failure of title in those purchasing from an Official Receiver not so appointed. In the present case there was no special appointment unless the order above set out can be so construed. *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1), followed earlier authorities *Muthuswami Swamiar* v. *Somoo Kandiar* (2) and *Official Receiver of Trichinopoly* v. *Somasundaram Chettiar* (3). *Muthuswami Swamiar* v. *Somoo Kandiar* (2) is also an authority to the same effect. I was a party to the decision in *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) and I adhere to my decision there. Therefore I must hold that unless the order appointed the Official Receiver, Receiver of the insolvent's property, there was no Receiver appointed in this case and the sales by a person purporting to act as such would be void. Now it is said that the Court by its order set out above practically made a vesting order under the Act. What the Court did was to transfer the petition to the Official Receiver " for disposal. " I do not think that the fact that the petitioner (debtor) asked that his immoveable property should be sold and his debts settled can give any other or wider meaning to the order of transfer. The Court has certain powers of delegation—S. 20 of the Act V of 1920 provides that the High Courts may delegate to Official Receivers certain specified powers, *inter alia,* the hearing of insolvency petitions, examination of debtors and the making of orders of adjudication. The Official Receiver has no delegated power to appoint a Receiver. The respondent contends that the procedure prescribed for the Court and for Official Receivers when acting under their delegated powers are different and that the latter are in fact under such circumstances Courts in themselves. *Subba Aiyar* v. *Ramaswami Aiyangar* (4) is cited as an authority for this proposition. There the order was 'The petition is transferred

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(1921) 41 M L J 78. 2. (1920) 39 M L J 438 : 43 M 869.
3. (1916) 30 M L J 415. 4. (1921) I L R 44 M 547 : 40 M L J 209.

Kavali Sankara Rao v. Rama-krishnayya — Odgers, J.

to the Official Receiver for adjudication and for the administration of the estate.' The learned Judges held that the combined effect of S. 20 (*c*) and (*e*) and S. 23 of the Act of 1907 [S. 59 (*c*) and (*e*) and S. 58 of the present Act] was that the order to administer enabled the Official Receiver to sell the insolvent's estate. They distinguished the case in I. L. R. 43 Madras 869, while deploring the deficiency in the Act which does not provide that immediately on adjudication the estate shall vest in the Official Receiver. Their decision was that the Official Receiver was the agent of the Court and as under S. 23 (S. 58) the latter has all the powers of a Receiver, it was capable [S. 20 (*e*) : S. 59 (*e*)] of appointing an agent to take any proceedings sanctioned by the Court and that the Court might under S. 20 (*a*) [: S. 59 (*a*)] sell the property of the insolvent through such agent. The difficulty as to appointment of a receiver was thus obviated in this case. The learned Judges did not give an opinion on the other argument advanced in that case, *viz.*, that the order of transfer may be construed as an order under S. 18 (: S. 56) vesting the property in the Receiver to take effect if and when adjudication took place. It will be observed that the order of transfer in the present case did not contain the words "for the administration of the estates" and this in my opinion is sufficient to distinguish it from the case in *Subba Aiyar* v. *Ramaswami Aiyangar* (4). The present petition was not even transferred for adjudication but merely for disposal. I am unable to agree that the transfer in the present case had any further operation than to transfer to the Official Receiver for disposal of the petition for adjudication and I think the Official Receiver under his delegated powers under S. 80 was *functus officio* when he has carried out the duties delegated to him, in this case the disposal of the petition. The next contention by petitioner is that S. 68 applies to this case—and that the Official Receiver was certainly a receiver in this case though one of his acts is impugned. If he was never legally appointed a Receiver, he is a mere intermeddler with the property and if so, it is said the District Judge had no power to set aside the sales under the Act [cf. *Avanashi Chetti* v. *Muthu Karuppan Chetti* (5)], there being no 'person aggrieved by any act or decision of the Receiver.' The answer to this appears to me to be that in

4. (1921) I L R 44 M 547 : 40 M L J 209. 5. (1918) 23 M L T 319.

Kavali Sankara Rao v. Ramakrishnayya

Odgers, J.

Muthuswami Swamiar v. *Somoo Kandiar* (2) the sale was either set aside or declared to be void—it is not clear which In *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (1) it was held that defendant had no title to the property. Both cases were under the Insolvency Act and both were cases of sales by Official Receivers not legally appointed Receivers in the respective insolvencies. This seems to me to conclude the respondent's contention on this point. As to limitation, S. 68 prescribes a period of 21 days for an application by a person aggrieved by act or decision of the Receiver. It is quite clear that a Receiver means one legally appointed, *i. e.*, one appointed under the provisions of S. 56 of the Act. I am, therefore, of opinion that the Official Receiver not having been appointed Receiver in this insolvency, the sales by him are void and ineffective to pass any title to the purchasers and these Civil Miscellaneous Appeals must be allowed with costs.

I agree with my learned brother in the Order he proposes.

A. V. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Ayyadevara Surya Chandra Mohanleswara Rao, minor by mother and guardian Rangamma and another .. *Appellants** (*Defendants*).

v.

Ayyadevara Durgamba *alias* Mahalakshmamma .. Respondent (*Plaintiff*).

Ayyadevara Mohanleswara Rao v. Ayyadevara Durgamba.

Hindu Law—Widow—Maintenance—Enhanced maintenance in future—Release of right of —Validity —Residence —Right of —If separate from that of maintenance.

An agreement by a Hindu widow to receive maintenance at a particular rate is, no doubt, not binding for all time ; but an agreement which goes further and binds her not to claim a higher rate even in changed circumstances is binding on her.

Quaere whether the right of residence is a separate right from that of maintenance.

*A No. 68 of 1921. 17th October, 1923.

2. (1920) I L R 43 M 869 : 39 M L J 438. (1921) 41 M L J 78.

Ayyadevara Mohan-leswara Rao v. Ayyadevara Durgambai

Appeal against the decree of the Court of the Subordinate Judge of Bezwada in O. S. No. 34 of 1919.

V. Suryanarayana for appellants.

V. Rama Das and *N. Rama Rao* for respondent.

The Court delivered the following

JUDGMENT :—In this case the plaintiff is the widow of the deceased brother of the 1st defendant's father and she brought this suit for maintenance and obtained a decree. The defendants now appeal.

When the plaintiff brought her suit originally she ignored the existence of certain documents executed in 1913, Exs. II and IV, whereby her right to maintenance was fixed at Rs. 75 per annum; but after the written statement was filed she amended her plaint and alleged that these documents were not binding on her and that she was entitled to maintenance at a higher rate. The Subordinate Judge found that the documents of 1913 were not obtained by undue influence and that the plaintiff had executed her counterpart with full knowledge of its contents and effect ; but held that the stipulation in that document that she would not claim any higher rate of maintenance in the future was not binding on her apparently because the 1st defendant's father had not similarly undertaken that he would never claim a right to reduce the rate of her maintenance. On this ground he held that the plaintiff was not bound by her agreement.

The argument advanced by Mr. Ramadas on behalf of the respondent is that in no circumstances can a Hindu widow enter into a valid agreement agreeing to relinquish her right to claim enhanced maintenance in future ; but we have been referred by the learned Vakil for the appellant to cases of this Court in which the right of a widow to relinquish her right to enhanced maintenance in the future has been recognised, and in two unreported cases, Appeal No. 12 of 1920 and A. A. O. No. 316 of 1918, it has been definitely held that an agreement by a widow not to claim enhanced maintenance is a binding agreement and must be enforced. The case in *Subramania Pattar* v. *Vembammal* (1) is not a direct authority, because in that case there was only an agreement to receive maintenance at a certain rate for life and it was there held that that did not amount to a release of the widow's right to increased maintenance in the future ; but it is clear from the judgment that

1. (1904) 14 M L J 339.

Ayyadevara Mohanleswara Rao v. Ayyadevara Durgamba.

the learned Judge recognised the possibility of a widow releasing her right, such a release being binding upon her. As against this Mr. Ramadas has referred us to several cases, not one of which is exactly in point, but which go to show that an agreement or a decree for maintenance at a specific rate is always subject to alteration in the future if the circumstances of the family necessitate such a change, *vide Gopi Rabai* v. *Dattaaraya* (2), *Raja Venka Nayanim Varu* v. *Raja Thimma Nayanim Varu* (3) and *Bangaru Ammalv.Vijayamachi Reddiar*(4). They undoubtedly recognise the fact that an agreement to receive maintenance at a particular rate is not binding for all time; but none of them is authority for holding that, when the agreement goes further and binds the widow not to claim a higher rate even in changed circumstances, it is not binding on her. The cases we have already referred to cited by the appellant are authority to the contrary and we entirely agree with the views therein expressed. In that view, these documents, Exs. II and IV are binding on the plaintiff and she is not entitled to any higher maintenance.

It was then sought to support the decree of the lower Court on the ground that the finding that Exs. II and IV were executed with the plaintiff's knowledge of their contents and effect was wrong. The argument put forward here was that the plaintiff being a woman had not had the opportunity of extraneous advice and that she had been induced by her brother-in-law, the 1st defendant's father, to execute the deeds. In the first place, that was not her case in the plaint where she alleged that she was deceived into putting her signature to some documents of the contents of which she had no idea and in her evidence she also stated that it was only after the written statement in this suit was filed that she understood that the maintenance deed was in existence. In the evidence as put forward the only thing that appears, even if we believe the witnesses, is that neither the plaintiff's father nor her brother were present when the maintenance deed was executed ; but it is admitted that one Veerabhadra Ayyar, who is closely connected with the plaintiff's uncle and manages his estate, not only attested the document but identified the plaintiff at the registration office. On this evidence we think that the Subordinate Judge's conclusion is perfectly right.

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2. I L R 24 B 366. 3. (1914) 27 M L J 656. 4. I L R 22 M 175.

Ayyadevara Mohanleswara Rao v. Ayyadevara Durgamba

It is then urged for the respondent that she ought to be given a right of residence because that was not expressly released in the documents executed by her and it is contended that the right of residence is a separate right from that of maintenance. Without our deciding that point, however, the first defendant has agreed that the plaintiff should be allowed a room which is to be built on a site adjoining the family house in Nandigama for her residence. Therefore, while allowing the appeal and setting aside the decree of the lower Court, we give a direction that the palintiff be given one room to be built as above.

The respondent will pay the appellant's costs throughout.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Lanka Rama Naidu ... *Appellant* (Respondent-Judgment-debtor).*

v.

Lanka Ramakrishna Naidu ... *Respondent (Petitioner-Decree-holder).*

Lanka Rama Naidu v. Lanka Ramakrishna Naidu

Civil Procedure Code (1908), S. 47—Sale Proclamation—Order settling—Order in which property is to be sold—Order settling—Appeal from—Maintainability.

A Judge acts not judicially but only administratively when he settles a sale proclamation ; his order does not come within S. 47 of the Code.

Held, therefore, that no appeal lay against an order merely settling one of the terms of the sale proclamation, namely, the order in which the property was to be sold.

The ruling in *Sivagauri Achi* v. *Subramania Aiyar,* I L R 27 M 59 : 14 M L J 57 (F B) is good law even under the present Code.

Appeal against the order of the District Court of Kistna at Masulipatam dated 23rd January, 1923 in E. A. No. 54 of 1923 in E. P. No. 49 of 1922 in O. S. No. 88 of 1919 on the file of the Sub-Court, Cocanada.

G. Lakshmanna and *V. Viyanna* for appellant.

P. Somasundaram for respondent.

The Court delivered the following

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*A A O No. 59 of 1923. 13th November, 1923.

Lanka Rama Naidu v. Lanka Ramakrishna Naidu.

JUDGMENT :—This is an appeal under Ss. 47 and 96 of the Code of Civil Procedure against an order made by the District Judge directing the sale of two items of properties, items 1 and 2, according to the order in which they were advertised for sale in the sale proclamation, that is, directing item 1 to be sold first and then item 2. The judgment-debtor, the appellant before us, had, without notice to the decree-holder, got an order from the District Judge that item 2 should be sold first and not item 1. This was an *ex parte* order which, on the decree-holder coming to know of it, was sought by him to be altered so that the sale might take place according to the order in the sale proclamation itself. No doubt, the decree-holder stated as his reason in his application that item 2 was his own property and was wrongly included in the decree as chargeable with the decree amount. The District Judge has not gone into that question at all or given any finding about it. He set aside his original *ex parte* order and directed that the property be sold according to the sale proclamation, that is, item 1 first.

The judgment-debtor appeals against that order, and a preliminary objection has been taken by the learned vakil for the decree-holder that no appeal lies and reliance has been placed by him on *Sivagaori Achi* v. *Subramani Aiyar* (1). This case before us certainly seems to be covered by that ruling as the order of the District Judge was merely one settling one of the terms of the sale proclamation, namely, the order in which the property was to be sold. It was held in the Full Bench that the District Judge acted not judicially but only administratively when he settled the sale proclamation and, therefore, the order in that case was not one which came within S. 244 of the old Code corresponding to S. 47 of the present Code. We are bound by that ruling unless we can agree with the argument of the appellant that the alteration of the wording of O. 21, R. 66 of the new Code which corresponds to S. 287 of the old Code has altered the position altogether. The only additions in the new Code which have been pointed out are that power is now given (1) to give notice to the judgment-debtor and the decree-holder to be present when the terms of the sale proclamation are settled and (2) to insist upon every application for an order for sale under the rule to

1. (1903) I L R 27 M 259 : 14 M L J 57 (F B).

be accompanied by a statement signed and verified in the manner prescribed for the signing and verification of pleadings and containing so far as they are known to or can be ascertained by the person making the verification, the matters required by sub-rule (2) to be specified in the proclamation, namely, as to the revenue assessed upon the property, as to the incumbrance to which the property is liable, as to the amount for the recovery of which the sale is ordered, and other things which the Court considers material. It is argued that these provisions show that the Court is acting judicially and it is also urged that the omission of S. 288 supports that argument. It seems to us that these two additions do not alter the position at all. They simply give power to the Court to have the parties before it in settling the sale proclamation and their affidavits so that it may get the help of the parties in settling it. The Full Bench in *Sivagauri Achi* v. *Subramania Aiyar* (1) adduced as the most important reason for holding that a Judge, acting under S. 287, was acting administratively and not judicially that special power was given to him under that section to summon a person when the Judge thought it necessary to do so and examine him in respect of matters on which information was wanted by the Court and to require him to produce documents. The argument of the Full Bench was that, if the Court was acting judicially in the matter, such power need not have been expressly given but the Court would have the power to do so under its general powers without an express section provided for the purpose. That provision is left in tact in the new Code and is not altered and the argument therefore applies to the new Code. No doubt, the referring Judges in the Full Bench case did allude to the fact that S. 288 also corroborated their opinion, for it was argued that a special protection for a Judge need not have been given by a special section of the Code if that officer was acting as a Judge, as he would be protected under the Act for the protection of the Judicial Officer. That argument no doubt will not now apply because the provision has been omitted but we think that the omission of the provision does not lead to any conclusion the Court now acts in a judicial capacity rather than in an administrative capacity in settling the terms of the sale proclamation. S. 288 was really put in by way of abundant caution and, as

1. (1903) I L R 27 M 259 : 14 M L J 57 (F B).

Lanka Rama Naidu. v Lanka Ramakrishna Naidu.

it was found to be unnecessary it has been deleted and not because of any change in the law. We think that the ruling in *Sivagauri Achi* v. *Subramanya Aiyar* (1) still governs the case and that no appeal can be allowed in a matter like the one before us where the Court merely settles the order in which the properties are to be sold. Our attention was drawn to a decision in *Vedaviasa Iyer* v. *Madura Hindu Labah Nidhi Co., Ltd.,* (2), but that case is distinguishable from the present case, for there their Lordships were able to come to the conclusion on the facts of that case, that what was decided in that case by the lower Court was not the order in which the properties were to be sold but whether the properties of one mortgagee or of another mortgagee should be sold first. On that view they held that the order was one affecting the rights of two defendants *inter se* and, therefore it was a matter which would come under S. 47 of the Code. Whether this is a right view or not we are not called upon to say for here no such question arises. This is purely a matter of settling the order in which the sale is to take place. 27 M .259 has been followed and applied even to cases from the original side by the learned Chief Justice and one of us in *Tawker and Sons* v. *Harsookdoss Choughmull* (3). In these circumstances, we hold that no appeal lies in the present case and dismiss it.

Under these circumstances, we do not allow any costs to either side in this appeal.

A. S. V. *Appeal dismissed.*

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1. (1903) I L R 27 M 259 14 M L J 57 (F B). 2. (1923) 45 M L J 478.
3. (1923) 45 M L J 611.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Ramaswami Naidu and others (minors) by next friend Lakshmi Ammal ... *Appellants* in A. A. O. No. 205 of 1923 and Petitioners in C. R. P. No. 466 of 1923. (Plaintiffs-Petitioners).*

v.

Ayyalu Naidu ... *Respondent in both (1st defendant-respondent.)*

Ramaswami Naidu v Ayyalu Naidu.

Civil Procedure Code, O. 40—Manager appointed under—Position and rights—Receiver—Removal of person from position of—Order refusing—Appeal from—Civil Procedure Code, O. 40, Rr. 1, 4 ; O. 43, R. 1 (s).

An order refusing to remove a person from his position of receiver is not an order coming under O. 40, R. 1 or R. 4, C. P. C. ; and, therefore no appeal lies against it under O. 43, R. 1 (*s*).

There is no provision in the Code for appointing a manager ; when a manager is appointed, it is really another name for the appointment of a receiver under O. 40, C. P. Code.

Appeal against the petition to revise the order of the Court of the Additional Subordinate Judge of East Tanjore at Mayavaram dated 9th February, 1923, in I. A. No. 52 of 1923 in O. S. No. 1 of 1922.

P. R. Ganapathi Aiyar for appellants.

S. Varadachari for respondent.

The Judgment of the Court was delivered by

Krishnan, J. :—This is an appeal against an order refusing to remove the 1st defendant from his position of receiver in a partition suit brought against him and another.

A preliminary objection is taken to the maintainability of this appeal on the ground that no appeal lies under O. 43, R. 1 (*s*) of the Civil Procedure Code. The clause gives a right of appeal only against orders passed under Rr. 1 and 4 of O. 40. It is contended first by the appellant's vakil that this is a case which would fall under O. 40, R. 1 (*a*) itself on the ground that they wanted not only to get the present receiver removed but another man appointed in his place and he, therefore, contends that this a case where the Court has refused

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*A A O No. 205 of 1923
(C R P No. 466 of 1923). 13th November, 1923.

Ramaswami Naidu v Avyalu Naidu.

to appoint a receiver. We are unable to accept this contention; for, till the present receiver is removed, there will be no scope for appointing another receiver in his place and, therefore, the authority cited by him *Munilal* v. *Jagannath* (1) which deals with a case of refusal to appoint a receiver does not apply. Refusing to remove a receiver already appointed is quite different from refusing to appoint a new receiver.

It was then contended that this application should be treated as one falling under O. 40, R. 1 (*b*). That clause says "Remove any person from the possession or custody of any property," and it is argued that, when the present receiver is removed, "it would necessarily result in his being removed from the possession or custody of the property in suit. That argument also we are unable to support as we think that the word "person" in cl. (*b*) refers to a person other than a receiver," for cl. (*c*) shows that the property removed from the possession or custody of the person referred to in cl. (*b*) is to be committed to the possession, custody or management of the "receiver" by cl. (*c*). We think that it is impossible to bring this case under O. 40, R. 1; and, of course, it does not fall under O. 40, R. 4. Therefore, we must hold that no appeal lies. We are fortified in this view by the rulings of the Calcutta High Court in 20 C. W. N. 789 and 24 I. C. 862. The appeal, therefore fails and is dismissed with costs.

It was then contended that we should interfere in revision with the order of the lower Court as the lower Court fell into a mistake in thinking that the 1st defendant was not appointed a receiver but only a manager. There is no provision for appointing a manager under the Code. When a manager is appointed, it is really another name for the appointment of a receiver under O. 40; and in this case the appointment was actually made under O. 40, C. P. Code. We do not think that the lower Court fell into any error in thinking that the 1st defendant was not, in fact, a receiver appointed under the Code. There is no question of jurisdiction or of any acting with material irregularity in the exercise of jurisdiction arising in this petition. This petition is, therefore, incompetent and must also be dismissed.

A. S. V. *Appeal and petition dismissed.*

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1. (1915) 33 I C 735.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Ramaswami Reddi *Appellant** (*Respondent-plaintiff*).

v.

Talaivasal Marudai Reddi and others *Respondents* (*Appellants-defendants*).

Ramaswami Reddi v. Marudai Reddi

Civil Procedure Code, S. 11—Heard and finally decided—Decree in favour of a party—Adverse finding not res judicata.

In a prior suit instituted by plaintiff to eject the defendant from certain land, the latter pleaded that he had a permanent tenancy and in the alternative that even if he was a yearly tenant, the tenancy had not been determined by a valid notice to quit. The trial Court found that the defendant had failed to establish a permanent tenancy but dismissed the suit holding that the defendant was a yearly tenant and there was no proper notice to quit. On appeal by the plaintiff the appellate Court upheld the dismissal of the suit on the ground of want of a notice to quit without deciding on the plea of permanent tenancy. In a subsequent suit in ejectment brought by plaintiff after due notice, the defendant again set up a permanent tenancy. *Held* that the decision in the prior suit did not operate as *res judicata* and that the plea of permanent tenancy was open to the defendant in the subsequent suit.

Midnapore Zemindari Co. v. *Naresh Narain Roy*, 48 C 460 followed.

Appeal against the order of the Court of the Subordinate Judge of Trichinopoly, dated 12th October, 1922 in A. S. No. 33 of 1922 preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 485 of 1919.

M. S. Vaidyanatha Aiyar for appellant.

S. T. Srinivasagopalachari for respondents.

The Judgment of the Court was delivered by

Krishnan, J. :—This is an appeal against an order of remand by the Subordinate Judge of Trichinopoly in a suit brought by the plaintiff for ejectment of the defendants from the plaint properties. The defendants pleaded *inter alia* that they had a right of occupancy in the land and that they could not be ejected. This plea, it was urged by the plaintiff, was *res judicata* between the parties and could not in consequence be raised by the defendants. The Munsif gave effect to the plea and took no evidence on the question of occupancy right. The Subordinate Judge has reversed his judgment and has held that the plea of *res judicata* is not well founded, and, having also held on another preliminary issue on the question

*A A O No. 406 of 1922. 29th November, 1923.

Pamaswami Reddi v. Marudai Reddi.

of limitation that that issue should be found upon only after evidence was taken in the case, has remitted the suit to be tried by the Munsif after taking such evidence.

The main question argued before us is the question of *res judicata* and that question arises in this way. The plaintiff, as the transferee from the purchaser of the land in a revenue auction sale brought a suit, O. S. No. 883 of 1902, for the purpose of ejecting the present defendants 1 to 3 and of recovering possession of the property on the strength of his title thereby obtained. In that suit these defendants had pleaded that they had a right of occupancy and therefore they were not liable to be ejected, but they raised another plea in the alternative, namely that, in the event of their not establishing their right of permanent occupancy, they were at least tenants and were entitled to notice to quit before they were ejected and that therefore the plaintiff's suit should fail. The other pleas raised in that suit need not be referred to at present. When the suit came on for trial the District Munsif held against the defendants and in favour of the plaintiff that the defendants had failed to establish a right of permanent occupancy. He held however at the same time that they had a right of a yearly tenancy in the plaint property and that as no notice to quit was given by the plaintiff, the plaintiff should fail and he therefore dismissed the suit. The defendants, having succeeded in the suit before the District Munsif, naturally filed no appeal, but the plaintiff filed an appeal to the District Court. The District Court did not actually go into the question of the permanent occupancy, for it held that even if a permanent occupancy right was not established, the defendants should be held to be yearly tenants and that such a tenancy was not an encumbrance which could be wiped off by a revenue auction sale and therefore the plaintiff could not succeed without giving a proper notice to quit, and, as he had not given such notice, it dismissed the appeal. There was a second appeal by the plaintiff to this Court and this Court accepting the District Judge's finding considered that, on the finding that there was at least an yearly tenancy in the matter and no notice to quit was given, Act II of 1864 did not destroy that right, and dismissed the second appeal. Now it is the finding of the District Munsif in that suit that the defendants had no right of permanent occupancy that is pleaded as *res judicata* in the present suit.

Ramaswami Reddi v. Marudai Reddi

There are two authorities, which have been referred to by the Munsif and by the learned vakil for the appellant which support the contention that when a Court comes to a definite conclusion on an issue and gives a finding on that issue that issue would be *res judicata* even if the decree in the case is not based on that issue. The cases relied on are *Muthu Pillai* v. *Veda Viyasa Chariar* (1) and *Ramakrishna Naidu* v. *Krishnaswami Naidu* (2). There is a case however which has been referred to by the Subordinate Judge which is in conflict with this case ; see *Laxmipathaya* v. *Ramachandra* (3), where a question very similar to this was decided in favour of the parties pleading that there was no *res judicata*. We need not however, consider these cases for we think that the matter has been settled by the Privy Council in the decision quoted by the Subordinate Judge, *Midnapur Zamindari Company* v. *Naresh Narayan Roy* (4). In that case the defendant had pleaded a right of permanent occupancy and he also pleaded that, as he had a right of renewal, the suit was premature. The first Court had found that he had no right of occupancy but held that the suit was premature and dismissed the suit against him. The plaintiff had filed an appeal but the defendant had also filed a cross appeal contesting the finding on the question of the permanent occupancy right, and the High Court dismissed the plaintiff's appeal holding that the suit was premature, and further gave a finding also on the question of the permanent occupancy right set up by the defendant in his cross appeal that no such right was proved. In spite of a cross appeal having been filed, the Privy Council held in the subsequent suit where it was pleaded that the question of the right of occupancy was *res judicata* between the same parties that it was not so. Their Lordships say at page 467 of the report " Their Lordships do not consider that this will found on actual plea of *res judicata* for the defendant having succeeded on the other plea, had no occasion to go further as to the finding against them. " That case exactly covers the present case. Here there was no necessity really to find on the question of permanent occupancy set up by the defendant, for even if the Court had assumed that he had no such occupancy right the result would have been the same ; a tenancy from year to year would result and that would require a notice to quit to put an end to it.

1. (1920) 12 L W 277.
2. (1918) 36 M L J 641.
3. (1916) 31 M L J 311.
4. (1921) I L R 48 C 460. (P C).

In view of this ruling of the Privy Council we need not resolve the conflict between the different cases cited in Madras. We think that we are bound to follow the Privy Council ruling, and following that ruling we hold that that the Subordinate Judge is right in deciding that the plea of *res judicata* is not well founded in this case.

As regards the question of limitation we think the Subordinate judge is right in saying that question must be decided after taking evidence and should not be decided without any evidence at all.

In the result the C. M. A. fails and it is dismissed with costs.

A. V. V *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(FULL BENCH.)

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice,* MR. JUSTICE RAMESAM AND MR. JUSTICE WALLER.

Kokku Parthasaradhi Naidu Garu *Petitioner* (1st respondent).*

v.

Chintalachervu Koteswara Rao Garu and another *Respondents (Petitioner and 2nd respondent).*

F. B.

Parthasarathi Naidu v. Koteswara Rao.

Madras Local Boards Act (XIV of 1920) S. 57—Rules framed by the Local Government —Rules 1, 4 (3) and 12 (2) —Election of President of a Taluq Board —Objection to election —Scope of the enquiry —Decision of District Judge —Persona Designata —Court —Finality of decision —Revision —Interference by High Court—C. P. Code S. 115.

A District Judge enquiring into an objection to the election of the President of a Taluq Board under R. 1 of the Rules made by the Local Government under Madras Act XIV of 1920, is not a *persona designata* but a "Court" subject to the revisional jurisdiction of the High Court under S. 115, C. P. Code. *National Telephone Company, Ltd.* v. *Postmaster General* (1913) A. C. 546, 562 relied on.

The decision of the District Judge on the enquiry is revisable by the High Court in spite of the fact that his decision is declared "final" by S. 57 and R. 12 (2) of the rules framed under the Act.

The petitioner, a qualified person, was appointed a member of a Taluq Board by the President of the District Board acting under S. 9 of the Local Boards Act. Subsequently the petitioner was duly elected president of the Taluq Board. A petition was thereupon filed before the District Judge for a declaration that the election might be declared void and annulled and that the respondent, a defeated candidate in the election, should be declared to be duly elected. The District Judge held that the petitioner had not been properly appointed a member of the Taluq Board and was therefore not eligible for election

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*C. R. P. No. 17 of 1923 12th November 1923.

F. B

Partha-saradhi Naidu v. Koteswara Rao.

to the Presidentship of that Board and annulled his election. The petitioner preferred a revision petition to the High Court. *Held* that in the absence of any of the disqualifications enumerated in Ss. 55 and 56 of the Madras Local Boards Act the appointment of the petitioner by the President of the District Board could not be questioned by the District Judge. Further it was not competent to the Judge on a pettition dealing with an election to the Presidentship, to go into the question whether a particular candidate was duly appointed a member of the Taluq Board. The order of the District Judge was therefore set aside.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Guntur dated 22nd December, 1922 in O. P. No. 82 of 1922.

The above Civil Revision Petition came on for hearing before a Bench of which the Chief Justice was a member and His Lordship directed the case to be posted for disposal before a Full Bench having regard to the difference of judicial opinion on the questions involved in the case.

Dr. Swaminathan for petitioner.

C. V. Ananthakrishna Aiyar, V. Rama Das and *Ch. Ragava Rao* for respondents.

Sir Walter Schwabe, K. C.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an application for the revision of the decision of the District Judge acting under the powers conferred upon him by the rules framed under the Madras Local Boards Act of 1920. By the rule 1 of the rules issued by the Local Government under the powers conferred on them by S. 199 (2) (*c*), "No election of a Member or of a President of a District, Taluq, or Union Board shall be called in question except by an election petition presented in accordance with these rules, to the District or Subordinate Judge having jurisdiction." A preliminary point is taken that this Court has no power of revision, under S. 115 of the Code of Civil Procedure over the decision of a District or Subordinate Judge when acting under that rule. That depends on whether the Judges therein referred to are acting as Courts, or acting merely as *persona designata*, that is to say, persons selected to act in the matter in their private capacity and not in their capacity as Judges. There has been considerable conflict of opinion on this point since the coming into force of this Act, and I do not think that the decisions that have been given on the matter are of great assistance to us in arriving at the proper conclusion, and we have to look at the Act and the rules and the law as it stands. The law is, I think, quite definitely established by the decision in *National*

F. B.

Partha-saradhi Naidu v Koteswara Rao.

Sir Walter Schwabe, C. J.

Telephone Company, Ltd. v. *Postmaster-General* (1) in the words of Lord Parker at page 562 that " where by statute matters are referred to the determination of a Court of Record with no further provision, the necessary implication is, I think, that the Court will determine the matters, as a Court. Its jurisdiction, is enlarged but all the incidents of such jurisdiction, including the right of appeal from its decision, remain the same. " If this matter had been referred to the District Court or Subordinate Judge's Court in terms, in my judgment, no question could arise, because, following the words of the judgment just quoted, the matter would be determined by the Court as a Court, it being given jurisdiction for this particular purpose, and all the incidents which include the incident of being liable to revision must follow, although no appeal would lie in this particular case because an appeal has been expressly precluded for by S. 57 (2) of the Act, and by the rules this " decision is to be final. " But as the word " Judge " is used and not the word " Court, " one has to look carefully to see whether the word " Judge " was used of him in his capacity as Judge or in his personal capacity, and I think great light is thrown upon this by two other rules. Rule 12 (2) of the rules for election refers to " an election or other competent Court " and it is quite clear that it is there referring to a Court of a District Judge or Subordinate Judge ; and, by R. 4 (3) of the rules for the conduct of inquiries, power is given to the District or Subordinate Judge in certain cases " to direct any Court subordinate to him to hold the inquiry. " I find it impossible to hold that a reference to a Judge with power to refer to a Court subordinate to him can mean anything else than reference to a Judge sitting as a Judge in the exercise of his ordinary jurisdiction extended for that purpose. For these reasons, in my judgment, the power of revision lies.

It is further argued that the fact that the decision of this Judge is, by S. 57 of the Act and by the rules final, preclude any revision. There is really no authority adduced in support of that proposition and, in my judgment, it would be quite contrary to the whole object and intention of S. 115 of the Code of Civil Procedure so to hold. That section only applies where there is no appeal. I know of no better way of directing that there shall be no appeal than by the legislature stating that the decision of a particular Court shall be final.

1. (1913) A C 546.

P. B.

Parthasaradhi Naidu v. Koteswara Rao.

Sir Walter Schwabe, C. J.

It is the ordinary mode of expression used for the purpose in much of the legislation in England on which this legislation is founded ; and, where the whole object of revision is to prevent a Court, from which there is no appeal, acting contrary to its jurisdiction, a finding that it is the law that, because the words used are "the decision shall be final," a Court, ordinarily subject to the revisional powers of this Court, should be permitted to act wholly without jurisdiction without the aggrieved party being entitled to any remedy, would in my judgment be untenable, and that would be the effect of deciding this second point in favour of the contention put forward.

On these grounds, in my judgment, this Court has revisional power and the preliminary point fails.

The petitioner was duly elected President of the Narasaraopet Taluq Board. A petition was subsequently filed before the District Judge of Guntur for a declaration that this election may be declared void and annulled and that the petitioner one Chinnatalacheruvu Kotiswara Rao, a defeated candidate in the election, should be declared to be duly elected. The District Judge found that the petitioner had not been properly appointed a member of the Taluq Board and was, therefore, not eligible for election to the Presidentship of that Board, and the matter comes before us on a petition for revision of that order.

It is contended, on the one side, that the decision of the District Judge was wrong and that this is a case for the exercise by the High Court of its revisional powers under S. 115, Civil Procedure Code, and, on the other side, that the decision of the District Judge is right, and that, even if it was wrong, his order is not a proper subject matter for revision.

The powers of a District Judge in the matter of election petitions are contained in S. 57 of the Madras Local Boards Act of 1920, and in the "Rules for the conduct of inquiries and the decision of disputes relating to elections," issued by the Local Government under their powers in that behalf under S. 199 of the Act. By S. 57, the Judge has power to determine whether an appointed member is disqualified under S. 55 or S. 56 by reason of the various grounds set out in those sections such as insanity, bankruptcy, being interested in contracts with a local board and the like, none of which are alleged in this case. The petitioner had been appointed by the President of the District Board purporting to act under S. 9 of the Act. By the rules above referred to, save as provided in

F. B.

Parthasaradhi Naidu *v.* Koteswara Rao.

Sir Walter Schwabe, C. J.

S. 57, no election of a member or a president can be called in question except by an election petition presented to the District or Subordinate Judge. This rule is somewhat obscure. I understand it to mean that, apart from the powers under S. 57, a petition to the District or Subordinate Judge is the only way of questioning the election. But I can find nothing either in the section or rules giving powers to a District or Subordinate Judge to question the appointment of a nominatedmember such as the petitioner, except on the spcified ground, namely, disqualification under Ss. 56 and 57. At the time of his election as president, he, the petitioner, was *de facto* a member of the Board and as such eligible for election to the presidentship. It is not suggested that there was any irregularity in the election; but what is suggested is that he was not eligible for election because he was not properly appointed a member by the President of the District Board. Now the appointments of members other than elected members are in certain cases in the hands of the Local Government, in certain cases in the hands of the President of the District Board and in certain cases in the hands of the President of the Taluq Board under S. 9 of the Act, and I can find nothing in the Act to suggest that a District or Subordinate Judge is intended to have any jurisdiction to decide whether the Local Government or the President of the District or Taluq Board as the case may be, properly exercised their power of appointment. What he has jurisdiction to decide is whether a person so appointed is disqualified under S. 55 or S. 56 and nothing else, and in my judgment, on a petition dealing with an election to presidentship, he cannot go into the question whether a particular candidate was duly appointed a member of the Board. Therefore, in my judgment, the District Judge in this case was acting wholly without jurisdiction in investigating that question and giving his decision upon it, and the matter therefore, comes directly under S. 115 (*a*) of the Civil Procedure Code. If it is desired to question the appointment of a member, it is probably open to question it in Court by proceedings in the nature of *quo warranto*.

Assuming that the District Judge had power to inquire into this matter, whether it can be said that the High Court has power to revise his order under S. 115 (*c*) is a very difficult question and one upon which I do not think it necessary or advisable to express any opinion or to add one more to the many

F. B.

Parthasaradhi Naidu v. Koteswara Rao.

Sir Walter Schwabe, C. J.

judgments dealing with what does come under that section and what does not nor do I consider it necessary for the decision of this case to go into the question whether the District Judge was right or wrong in the decision to which he came. But as the matter has been fully argued before us and as it is of considerable importance, I think it desirable that we should express our opinion, *obiter* though it may be.

The facts are that the President of the District Board while temporarily in Madras prepared and signed a list of his appointments including therein the petitioner, and sent a copy of that to the *Fort St. George Gazette.* The District Judge held that, by reason of S. 23(2) of the Madras Local Boards Act, all the appointments thus made were void. That section enacts that " during the temporary absence or incapacity of the President of a District or Taluk Board, the President's functions shall devolve on the Vice-President. " By S. 25, " the exercise of these powers by the Vice-President shall be subject to such restrictions, limitations and conditions as may be laid down by the President and shall also be subject to his control and revision. " I do not think that the mere absence for a few days of the President from his district on a visit to Madras necessarily vests in the Vice-President the power of appointing members of the Board. But even if it did, the fact is in this case the Vice-President did not make any appointment and the President returned to his district, and signed again in his district the list of appointments of these members and directed it to be posted on the board where, and not in the *Fort St. George Gazette,* it had by the Act to be posted. This was a perfectly proper exercise of the President's powers of appointment and, in my judgment, there was nothing wrong with the appointment of the petitioner at all.

It follows that this petition must be allowed, that the order of the District Judge must be set aside. The 1st respondent must pay costs throughout, including the costs of the 2nd respondent.

Ramesam, J.

Ramesam, J. :—I agree with my Lord's conclusion in the Judgment delivered that, in the light of the Rules made under the Act, the District Judge must be considered to be a Court and that, notwithstanding the use of the word ' final ' in S. 57, a revision petition lies to this Court.

The next question is whether there is any question of jurisdiction or material irregularity within the meaning of

F. B.
Parthasaradhi Naidu v. Koteswara Rao.
Ramesam, J.

S. 115, C. P. C. It is not suggested that the District Judge acted with material irregularity in the exercise of his jurisdiction. As to jurisdiction, I think one must start with the principles laid down by the Privy Council in *Balakrishna Odayar* v. *Vasudeva Aiyar* (2). "The section applies to jurisdiction alone, the irregular exercise, or non-exercise of it, or the illegal assumption of it. The section is not directed against conclusions of law or fact in which the question of jurisdiction is not involved." It follows that an error of law leading to an erroneous order only, does not justify our interference. An error of law leading to the exercise of a jurisdiction which did not exist or to the failure to exercise a jurisdiction which did exist, justifies such interference [see *Atchayya* v. *Sri Seetharamachandra Rao* (3)]. It must be remembered that every error of law cannot be regarded as the exercise of a jurisdiction which does not exist merely because, but for such error, the order of the Court would have been different; otherwise, all erroneous decisions can be modified or revised in revision. I agree with the observations of my brother Wallace, J. in *Ahmed Thambi Maraicair* v. *Basava Maracair* (4).

Applying these principles, it follows that, where a District Judge, who has jurisdiction to enquire into an election petition under the rules made under the Local Boards Act, 1920 passed, as the result of his enquiry an erroneous order based on an erroneous construction of the sections of the Act or the rules, the order cannot be interfered with in revision and it cannot be said in such a case, that, on account of his error of law, the District Judge exercised a jurisdiction which did not exist or failed to exercise a jurisdiction which existed. For instance when he held erroneously that the appointment of a member or president was void, it cannot be said merely by reason of such error that there was an erroneous assumption of jurisdiction. I do not think that the observations of Channell, J., in *Rex* v. *Manchester Justices* (5) help us in the application of S. 115. It is true that these observations have been quoted and applied by my brother Krishnan, J., in *Ramaswami Goundan* v. *Muthu Velappa Gounder* (6) I am unable to agree with

2. (1917) I L R 40 M 793, 799 : 33 M L J 69 (P C).
3. (1913) I L R 39 M 195 : 24 M L J 112.
4. (1922) 44 M L J 69 : 46 M 123.
5. (1899) 1 Q B 571, at p. 594.
6. (1923) I L R 46 M 536 : 44 M L J 1.

F. B.

Partha-saradhi Naidu v. Koteswara Rao.

Ramesam, J.

all the observations in that case. I also observe that, in that case, the ground of material irregularity was also available.

In the present case before us, I agree with my Lord the Chief Justice, in holding that the District Judge acted without jurisdiction. Under S. 57 he had jurisdiction to enquire into the validity of the appointment of a member only if it is questioned on the ground that he was disqualified under Ss. 55 and 56. No such ground was alleged or proved and the District Judge had no jurisdiction to enquire into the election petition. We have not here a case of his holding that he had jurisdiction to enquire by an erroneous construction of some section or rule of law. He merely enquired into a petition in which no ground, such as is mentioned in the section, was alleged.

I agree with the order proposed by my Lord.

Waller, J.

Waller, J., :—On the 1st point I agree that the judge referred to in rule I is not a *persona designata*. Rule IV (3), is I think, conclusive. A judge acting as *persona designata* has no Court subordinate to him. I agree also that the description of his decision as final means no more than that there is no appeal against it. It does not mean that a decision made without jurisdiction is not open to revision under S. 115 Civil Procedure Code.

It seems to me clear that, in this case, the Judge had no jurisdiction to decide what he did decide. Petitioner was an appointed member of the Board and his appointment could be questioned before the Judge only with reference to Ss. 55 and 56 of the Act. It could certainly not be qusetioned in a proceeding of this kind. The Act, no doubt provides that the President shall be elected from among the members of the Board. but that provision does not give the judge jurisdiction on an election petition to consider whether the members have or have not been properly appointed. He cannot disqualify them save on grounds that are not applicable here. The result in the present instance, was the petitioner remained an appointed member of the Board although the judge had set aside his election as president on the ground that he had not been properly appointed a member. On the last point I agree that petitioner was properly appointed and concur in the order allowing the petition and as to costs.

A. V. V. *Petition allowed.*

In the High Court of Judicature at Madras.
[Full Bench].

Present :—Sir Walter Salis Schwabe K. C. *Chief Justice*, Mr. Justice Phillips and Mr. Justice Ramesam.

Abdul Sattar Sahib *Petitioner** (*Applicant*).

v.

The Special Deputy Collector, Vizagapatam Harbour Acquisition and others *Respondents.*

F. B. — Abdul Sattar Sahib v Special Deputy Collector, Vizagapatam Harbour Acquisition.

Land Acquisition Act, 1894—S. 18—Reference to Court—Order refusing—Propriety—Revision against order—Right of—Civil Procedure Code, S. 115—Government of India Act, S. 107—Effect—Arbitrary refusal to refer—Remedy in case of—Necessity—Amendment of S. 18—Court—Court subordinate to High Court—Acting judicially—Meaning.

The High Court has no power under S. 115 C. P. Code or S. 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court an application under S. 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court.

Per Chief Justice and Ramesam, J..—The Act should be amended so as to give a remedy to the subject in respect of possible arbitrary acts of Land Acquisition Officers in declining to refer under S. 18.

Per Chief Justice :—The Officer acting as Collector under the Land Acquisition Act decided that certain land to be acquired by the Government was Government land, and that, therefore, no compensation was payable to anybody. One of the persons claiming to be interested in the land asked the Collector under S. 18 to refer the matter to the District Judge ; but the Collector refused to do so on the strength of his decision that the land was Government land. *Held,* that the Collector was wholly wrong in the course he took.

Discussion of the questions whether the Collector exercising his functions under S. 18 acts (1) judicially, (2) as a Court, and (3) as a Court subordinate to the High Court.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the decision, dated 30th June 1922 of the Special Deputy Collector, Harbour Acquisition, Vizagapatam in respect of the Land Acquisition of Survey No. 1 of Vizagapatam Swamp.

This petition came for hearing on Thursday and Monday the 13th and 17th days of September, 1923, the Court (Spencer and Odgers, JJ.) made the following

Order of Reference to the Full Bench :—

Spencer, J. :—This is an application under S. 115 of the Code of Civil Procedure asking us to revise the proceedings Spencer, J.

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*C R P No. 683 of 1922. 20th November, 1923.

F. B.

Abdul Sattar Sahib v Special Deputy Collector, Vizagapatam Harbour Acquisition.

Spencer, J.

of an officer acting as Collector under the Land Acquisition Act (Act I of 1894) wherein he refused to make a reference under S. 18 to the District Court in a matter upon which he had passed an award under S. 11.

The first question is whether a remedy lies by way of a revision petition. In *Best and Co.* v. *Deputy Collector of Madras* (1), it was observed by a Bench of this Court that the proceedings under the Land Acquisition Act until the matter came before the Land Acquisition Judge were not judicial proceedings and that the proper remedy of a person dissatisfied with the Collector's order was to sue under S. 45 of the Specific Relief Act for an order of *mandamus* and not to file a revision petition. This decision professed to be based on the ruling of the Privy Council in *Ezra* v. *Secretary of State for India* (2) confirming the opinion of the Calcutta High Court confirming the opinion of the Calcutta High Court reported at page 619, that the proceedings resulting in the award were administrative and not judicial. So too in *Kasturi Pillai v. Municipal Council, Erode* (3), it was observed that the Collector in making his award was not acting judicially. It has however been decided by another Bench of this Court in *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (4), that the Collector's proceedings under Part III of the Act dismissing an application for a reference to the Court regarding his award are judicial proceedings and are subject to revision, and I am not prepared to dissent from this view, seeing that it is quite consistent with what the Judicial Committee said in the case in *Ezra* v. *Secretary of State for India* (2). In *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5) and in *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna* (6), the Calcutta High Court took a similar view to that of this Court in *Parameswara Aiyar* v. *Land Acquisition Officer, Palghat* (4). *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5) was followed by another Court in *Hari Das Pal* v. *Municipal Board, Lucknow* (7). In *British India Steam Navigation Co.* v. *Secretary of State for India* (8), the learned Judges refrained from deciding this point. *The Deputy Collector, Calicut Division* v. *Aiyavu Pillai* (9), merely decides

1. (1916) 20 M L T 388. 2. (1905) I L R 32 C 605 (P C).
3. (1919) I L R 43 M 282 : 37 M L J 618.
4. (1918) I L R 42 M 231 : 36 M L J 95. 5. (1905) 12 C W N 241.
6. (1911) 16 C W N 327 : 13 I C 470. 7. (1913) 22 I C 652.
8. (1911) I L R 38 C 230. 9. (1911) 2 M W N 367.

F. B

Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition.

Spencer, J.

that Government need not be made a party to a reference under S. 18. There can be no doubt that Government is not a "claimant" or "person interested" in such proceedings. In *Balkrishna* v. *Collector, "Bombay Suburban"* (10), two learned Judges of the Bombay High Court expressed their dissent from the view taken by this Court in *Parameswara Aiyar* v. *Land Acquisition Officer, Palghat* (4), but as they have not in my opinion met the reasoning of the Madras Judges, I prefer to adhere to the opinions expressed in this Court and in Calcutta to the effect that a Collector proceeding under S. 18 of the Act is performing a judicial function and, as such, is subject to the extraordinary jurisdiction of the High Court.

In Bombay the doubt is expressed whether a Collector acting under Ss. 18 and 19 is a Court and, even if he is so, whether he can be said to be subordinate to the High Court.

But if as Krishnan, J. observed, the proceedings under those sections are really part and parcel of the final award by the Judge under S. 26 of the same chapter, there can be no difficulty in finding from S. 54 of this Act and S. 3 of the Code of Civil Procedure that they are proceedings of a Court subordinate to the High Court.

My learned brother desires to have the qusestion of jurisdiction referred for the opinion of a Full Bench. For my part I should be content to follow the decision of this Court reported in the authorised reports seeing that it is the most recent pronouncement of this Court and it was made after a full consideration of the earlier cases and is not inconsistent with the judgment of the Privy Council. But as my learned brother is of opinion that the question should be referred and I admit that there is considerable conflict of judicial opinion on the point, I agree to the reference in the terms proposed by him.

Odgers, J.

Odgers, J. :—In this Revision Petition, the first point raised is whether this Court has power to revise the proceedings of an officer acting as Collector under the Land Acquisition Act refusing to make a reference under S. 18 of the Act after making an award under S. 11.

The question has not been decided uniformly by the Courts in India and there are authorities both ways.

In *Best and Co.* v. *Deputy Collector of Madras* (1),

10. (1922) 25 Bom. L R 398. 4. (1918) I L R 42 M 231 : 36 M L J 95.
1. (1916) 20 M L T 388.

F. B.

Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition

Odgers, J.

Abdur Rahim, Offg. C. J., and Seshagiri Ayyar, J., agreed with the opinion of Mukerjee, J., in *British India Steam Navigation Co.* v. *Secretary of State for India* (8), and held that this Court could not revise an order of reference made by the Land Acquisition Collector. In *British India Steam Navigation Co.* v. *Secretary of State for India* (8), the learned Judges held (page 241) that the Collector when he holds an enquiry and makes an award under S. 11 is not a Court and is undoubtedly not a Court subject to the Appellate Jurisdiction of the High Court. They relied on *Ezra* v. *Secretary of State for India* (11) [afterwards in the P. C. in I. L. R. 32 Cal. 605.] In *Ezra* v. *Secretary of State for India* (11) it was held that the Collector in making his award is not a judicial officer. The Privy Council held that the proceedings resulting in an award by the Collector were administrative and not judicial and that if the judicial ascertainment of value is desired by the owner, he can obtain it by requiring a matter to be referred by the Collector to the Court.

There is also the case in *Balkrishna* v. *Collector, "Bombay Suburban"* (10), where Macleod, C. J. and Crump, J., held that the refusal of the Collector to refer is not an order of a Court and not as such subject to the High Court's powers under S. 115 of the Civil Procedure Code. They expressly dissent from *Parameswara Aiyar* v. *Land Acquisition Collector, Palghat* (4) (to which reference will be made immediately) and held that the remedy was by way of suit as the High Court has not been given power to interfere with the proceedings of the Collector.

On the other side we have *Parameswara Aiyar* v. *Land Acquisition Collector of Palghat* (4) (Ayling and Krishnan, JJ.). The learned Judges there based their decision on the view that there is a material distinction between Parts II and III of the Act and that in rejecting an application under S. 19 (which falls within Part III) the Collector acts judicially and his order is subject to revision by the High Court. They were pressed apparently by the fact that unless such an order was open to revision it was not clear what remedy a person aggrieved by it possesses. The Judges examined the cases *Best and Co.* v. *Deputy Collector of Madras* (1) and also

8. (1911) I L R 38 C 230. 11. (1902) I L R 30 C 36.
10. (1922) 25 Bom L R 398 : I L R 47 B 699.
4. (1918) I L R 42 M 231 36 M L J 95. 1. (1916) 20 M L T 388.

F. B

Abdul Sattar Sahib *v.* Special Deputy Collector, Vizagapatam Harbour Acquisition

Odgers, J.

Ezra v. *Secretary of State for India* (2) and *British India Steam Navigation Company* v. *Secretary of state for India* (8) and as they point out the two latter cases practically go no further than saying that proceedings resulting in the award are administrative aid not judicial. In *The Administrator-General of Bengal* v. *The Land Acquisition Collector* (5), the Calcutta High Court *held* that the Collector rejecting an application made under S. 18 (1) of the Land Acquisition Act acts judicially and his order is subject to revision. They based their ruling on the distinction between the Collector's functions under Parts II and III of the Act. *Krishna Das Roy* v. *The Land Acquisition Collector of Pabna* (6) follows this decision. This view has also been adopted. In the Patna High Court (*Saraswati Pattack* v. *The Land Acquisition Deputy Collector of Champaran* (12)].

Although I am inclined to agree with the view expressed in *Parameswara Iyer* v. *The Land Acquisition Collector of Palghat* (4) (above) yet I feel that in the conflicting state of the authorities that the law on this point should be settled. It may perhaps be alleged against the later Madras view that there is no authority in the wording of the Land Acquisition Act itself for drawing a distinction between the functions of the Collector under Parts II and III of the Act. The distinction appears to me to be necessary though it seems somewhat forced and artificial. We therefore decide to refer to a Full Bench this question :—

Has the High Court power under S. 115 C. P. C. or under S. 107 of the Government of India Act to revise the order of a Collector acting under the provisions of the Land Acquisition Act, 1894, refusing to refer to the Court an application under S. 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court.

T. Richmond, I. V Ramanuja Rao and *Y. Suryanarayana* for petitioner.

The Government Pleader for respondents.

The Court delivered the following

Sir Walter Schwabe, C. J

JUDGMENTS :—*The Chief Justice* :—This is a reference to a Full Bench under the following circumstances : The Officer acting as Collector under the Land Acquisition Act, Act

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2. (1905) I L R 32 C 605 (P C).
6. (1911) 16 C W N 327.
8. (1911) I L R 38 C 230.
12. (1917) 2 P L J 204.
5. (1905) 12 C W N 241 at 244.
4. (1918) I L R 42 M 231 : 36 M L J 95.

F. B.
Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition.
Sir Walter Schwabe, C. J.

I of 1884 decided, in the first instance, that certain land to be acquired by the Government for harbour purposes was Government land and that, therefore, no compensation was payable to anybody. Being dissatisfied with that decision or advice one of the persons claiming to be interested in the land in effect asked the Collector under S. 18 of the Land Acquisition Act to refer the matter to the District Judge. That application was refused on the ground that the land being Government land there was no right to compensation and that the land Acquisition Act had no application at all. A revision petition was then brought to this Court to revise that order and a preliminary objection was taken that this Court has no revisional powers over such orders. There is a considerable conflict of authority on the point and the matter has accordingly been referred to a Full Bench.

The only power of revision this Court has got is under S. 115 of the Code of Civil Procedure. By the terms of that section a High Court can revise any decision made in any case by any Court subordinate to such High Court, and in which no appeal lies thereto. It is argued first of all, on behalf of the Crown that the Collector exercising his functions under S. 18 is not acting judicially ; secondly, that he is not acting as a Court ; and thirdly, that, if he is acting as a Court, he is not a Court subordinate to the High Court. The authorities on the point are in an unsatisfactory condition, for in Madras there is the decision of a Bench in *Best and Co.* v. *Deputy Collector of Madras* (1), in which it was held that proceedings in the nature of Mandamus under S. 45 of the Specific Relief Act lay, because, and only because, this Court had no revisional powers in the matter ; consequently the revision petition in that case was dismissed and an application under S. 45 of the Specific Relief Act was allowed. The matter came before this Court again in *Parameswara Iyer* v *Land Acquisition Collector, Palghat*(4) where Ayling tnd Krishnan JJ., having considered the early Madras case, differed from the conclusion to which it came and held that the proceedings were those of a Court subordinate to the High Court and granted the revision petition. In so doing, they were following two cases in Calcutta. *The Administrator General of Bengal* v. *The Land Acquisition Collector of Pabna* (5). The same result has been arrived by

1. (1916) 20 M L T 388. 4. (1918) I L R 42 M 231 : 36 M L J 95.
5. (1905) 12 C W N 241.

F. B:

Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition.

Sir Walter Schwabe, C. J.

the Patna High Court in *Saraswathi Pattack* v. *The Land Acquisition Deputy Collector of Champaran* (12). Later the matter came before a Bench in Bombay in *Balakrishna Debi* v. *Collector of Bombay* (10), and having considered all these previous cases, the Bombay Court came to the conclusions that *Parameswara Iyer* v. *Land Acquisition Collector, Palghat* (4) was wrongly decided, and that there was no power of revision. With that conflict of authority we have to make up our own minds on the point.

In *Ezra* v. *Secretary of State for India* (2), the Privy Council has decided that the Collector, exercising functions under the Land Acquisition Act down to the point when he gives what is called his award, is acting only in an advisory capacity and is not exercising any judicial function at all ; but in these later cases, which I have referred to, it is pointed out, and I think correctly pointed out, that when he acts under Part III of which S. 18 forms part, he is acting in a different capacity, because he has there to decide certain things : he has to send the case to the District Court if certain provisions in that section have been complied with, one of which is the question of time ; that is to say, he has to decide whether the application is barred or not ; and in doing so, in my judgment, he acts judicially.

But the further question arises whether he acts as a Court. I think it is quite possible for persons to be given judicial functions or functions which they have to exercise judicially without their being made Courts properly so called, and I think a very clear instance is the case of registration authorities who have to decide whether or not they will accept registration of certain documents ; and it has been held by a Full Bench of this Court in *Krishnammal* v. *Krishna Iyengar* (13) that in respect of a refusal of registration by a registration Officer no revision petition lies to this Court because he is not a Court at all. I doubt if the Collector sits in a Court.

Further, the question arises, assuming that the Collector is a Court, is he a Court subordinate to the High Court within the meaning of S. 115 of the Code of Civil Procedure ? In my judgment, he is not. There is no power of appeal from

12. (1916) 2 P L J 201. 13. (1912) 23 M L J 51.
10. (1922) I L R 47 B 699. 4. (1918) I L R 42 M 231 : 36 M L J 95.
2. (1905) I L R 32 C 605 (P C).

F. B.
Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition.
Sir Walter Schwabe, C. J.

his decision to any one, either to the District Court or to this Court There is nothing in the Act to show that he is, in the true sense of the word in any way subordinate to the High Court. As far as Madras is concerned, the Courts recognised are those Courts, which are referred to in various statutes, such as, the Madras Civil Courts Act. His Court, if a Court at all must be a Civil Court. The Civil Courts are enumerated in the Civil Courts Act, and the Court of the Collector sitting under the Land Acquisition Act finds no place in that enumeration. On the whole, I think I must come to the conclusion that, even if the Collector, exercising his functions under S. 19 although those functions are, as I have pointed out, judicial functions, is a Court, he is not a Court subordinate to the High Court. Therefore, no revision lies to this Court.

I think, however, it is right to add that as far as one can see without having had the point argued before us, it should seem that the Collector was wholly wrong in the course that he took on this occasion. He himself had decided that it was Crown land. If he was wrong in that decision, then the applicant had a right to have his case heard on his claim for compensation. When he is asked to refer that matter—so I understand it—to the Court for a decision, that is to say to the District Court, he bases his refusal on his own previous decision that the land was Crown land, and assumes that, because he has decided that, that decision is final and conclusive and the party is not allowed under the Act to have that matter gone into by a Court ; it being worthy of observation that, in so deciding, he was not acting judicially at all, because he was then at a stage of the proceedings when, according to the Privy Council decision referred to above, he was merely acting in an advisory capacity. It is not for us to say what the proper remedy is whether he should move the Government to direct the Collector to do his duty, or whether he can take any and what form of proceedings to have his case heard, if he has a case which deserves to be heard.

The answer to the question referred to us is that the High Court has no power under S. 115 of the Code of Civil Procedure or under S. 107 of the Government of India Act, to revise the order of a Collector acting under the provisions of the Land Acquisition Act refusing to refer to the Court an application under S. 18 of the same Act by a person interested requiring him to refer the matter for the determination of the Court. As the preliminary point is one going to the root of

the whole matter, it is unnecessary for this case to go back to the Referring Bench and we dismiss this petition with costs.

F. B
Abdul Sattar Sahib v. Special Deputy Collector, Vizagapatam Harbour Acquisition.

Phillips, J.

Ramesam, J

Phillips, J. :—I agree.

Ramesam, J. :—I agree. I would only add that it is desirable that the Act should be amended so as to give a remedy to the subjects in respect of possible arbitrary acts of Land Acquisition Officers in declining to refer under S. 19 and not to leave them to depend upon the action of the Government in advising their officers.

The Chief Justice :—I agree with the observation just made by my brother Ramesam.

A. S. V. *Petition dismissed.*

(FULL BENCH.).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice*, MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE RAMESAM.

Best & Co., Ltd., Agents of the Nobel's Explosives Co., Ltd. *Appellant**.

v.

The Corporation of Madras *Respondent.*

F. B.

Best & Co v. Corporation of Madras.

Madras City Municipal Act —Madras Act IV of 1919, S. 110—R. 7, Sch. IV of the taxation rules under the Act—Incorporated companies transacting business in the City of Madras with paid-up capital in currency other than the currency of British India—Liability of such companies to be taxed under S. 110 and the taxation rules—Principles of construction of taxating statutes.

Incorporated companies which transact business in the City of Madras and whose paid-up capital is in a currency other than that of British India are liable to be taxed under S. 110 of the Madras City Municipal Act of 1919 and R. 7 Sch. IV of the taxation rules under the Act.

The principles of construction of taxing statutes enunciated.

Case stated under R. 17, Sch. IV of the Madras City Municipal Act, in M. T. Appeal No. 4 of 1922 on the file of the Court of Small Causes at Madras.

R. N. Aingar instructed by *King and Partridge* for the appellant.

P. Duraiswami Aiyangar for the respondent.

The Court (Spencer and Devadoss, JJ) made the following

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*R. C. No. 1 of 1923. 19th October, 1923.

F. B.

Best & Co
v.
Corporation
of Madras

Spencer, J.

ORDER OF REFERENCE TO A FULL BENCH :—

Spencer, J. :—I have perused the Judgment of my learned brother and I regret that I am unable to agree with his conclusions.

I agree with the opinion of the learned Chief Judge of the Court of Small Causes that Madras Act IV of 1919 does not either expressly or by implication confer on the Commissioner of the Corporation power to determine the value in the currency of British India of any sum expressed in any currency other than that of British India and that under R. 7 he can only impose assessment under S. 110 in respect of those companies the paid-up capital of which is expressed in rupees. In this view the first two questions of the case stated for the opinion of the High Court under R. 17 of Sch. IV will have to be answered in the negative and it becomes unnecessary to express an opinion on the third question.

On three points I am constrained to differ from my learned brother. In the first place I do not consider that it is legitimate for us to hazard a conjecture as to what the legislature may have intended when they framed the Act and the rules in this manner. For it probably did not occur to anybody at the time that some day a difficulty might arise from the omission to provide means for converting capital stated in foreign currency into rupees ; and as Rowlatt, J., observed in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1). " In a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used."

Next it has been suggested that the Commissioner in a particular case might estimate whether the capital of a foreign company would, if calculated in rupees, amount to more than twenty lakhs of rupees or less than one, and that it would always be open to the company to show that his estimate was wrong. But if the rate of exchange is not fixed and if the date when the calculation is to be made is not given, with a varying exchange, who is to say whether the Commissioner was right or wrong ? In cases on the border line a company might be liable to taxation on one day and not liable the next day.

1. (1921) 1 K B 64.

F. B.
Best & Co.
v.
Corporation
of Madras.
Spencer, J.

Then lastly my learned brother finds that S. 110 is very clear and, if I understand him rightly, he thinks that the Madras City Municipal Act as compared with the Madras District Municipalities Act gains in clearness by the omission in the City Act to define the meaning of " Company " in the definition clauses. I do not appreciate the suggestion that the omission to define a technical expression makes the matter more clear. But I agree that the important question here is to decide what is meant by the words in S. 110 " every incorporated company transacting business within the city." In the absence of any definition I do not see why we should not give the word "company " the same meaning as it has in the Indian Companies Act, S. 2 (2), viz., a company formed and registered under that Act or an existing company. S. 15 of that Act provides for the registration of companies and S. 23 for the certifying of incorporation ; and it is, therefore, only reasonable to suppose that by an " incorporated company " in S. 110 of Madras Act IV of 1919 a company registered under S. 15 of the Indian Companies Act and incorporated under S. 23 is intended. S. 253 declares what companies are authorized to be registered. S. 277 deals with the requirements of the Act as to companies established outside British India which proceed to establish a place of business within British India. As under S. 22 only the Registrar of a province, in which the registered office of the company is situated, can register a company and as the schedules to the Act apply only to companies whose capital is in rupees, I conceive that a Registrar would find considerable difficulty, if not inability, in dealing with the application for registration of a company whose registered office was not in India and whose capital was not stated in rupees.

By S. 20 of the Indian Stamp Act the legislature provided that *ad valorem* duty expressed in a foreign currency should be calculated according to the current rate of exchange on the day of the date of the instrument. But the Indian Companies Act and the Madras City Municipal Act contain no provision for converting foreign currencies into rupees. If the machinery for conversion of currency is lacking, it becomes impossible to say what the provisions of the Act including the schedules [for the rules must always be read in conjunction with the body of an Act, see *Mani Mohan Mandal* v. *Ramtaran Mandal* (2)], mean when they speak of rupees in relation to companies whose capital is not expressed in rupees.

2. (1915) I L R 43 C 148.

F. B.

Best & Co. *v.* Corporation of Madras

Spencer, J.

I am, therefore of opinion that the Indian Companies Act and the Madras City Municipal Act cannot be applied to companies which have not a place of business situate in British India, as they cannot get themselves registered in British India until they open a place of business in this country, and so they cannot become " incorporated companies " within the meaning of S. 110 of Act IV of 1919.

Mr. Aingar conceded that as " persons " include " companies " under S. 3, cl. (39), of the General Clauses Act, such companies are liable to pay taxes under S. 111. Therefore the result of my conclusion will not be that they will escape making any contribution whatever to the revenues of the Corporation, and the equity of the claim made by the assessed company has thus no bearing on the decision of the question that has been raised and referred to us.

Devadoss, J.

Devadoss, J. :—The Chief Judge of the Small Cause Court, Madras, has submitted the following questions of law for the opinion of the High Court :—

1. Whether or not incorporated companies which transact business in the City of Madras and whose paid-up capital is in a currency other than that of British India are liable to be assessed to the tax on companies under S. 110 and R. 7 of the taxation rules in Sch. IV of the Madras City Municipal Act, 1919 ?

2. Does the proviso to R. 7 apply to all companies transacting business within the city irrespective of their capital being in British Indian currency or any other currency ?

3. What is the meaning of expressions " gross income, " and " gross income received in or from the city " in the proviso to R. 7 ? Does the latter expression include income arising out of business transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras where they have their head office ?

This reference arises out of an appal presented by Messrs. Best & Co., Agents of the Nobel's Explosives Company, Limited, against the levy of the companies' tax by the Commissioner of the Madras Corporation on the grounds (1) that the paid-up capital of the Nobel's Explosives Company, Limited, being in sterling and not in rupees the scale of assessment under R. 7 of Sch. IV of the Act does not apply and the company is not therefore liable to the tax on companies under the aforesaid rule ; (2) if contrary to the above contention it is held that the company can be assessed under R. 7, this assessment

can be made under the proviso to that rule and the proper assessment to be imposed for the half-year in question is Rs. 25 only as the gross annual income of the company did not exceed Rs. 5.000. The learned Chief Judge held that the Nobel's Explosives Company, Limited, was not liable to be assessed under S. 110 and rule 7 of schedule IV and allowed the Appeal. He is " of opinion that the power to determine the value in currency of British India of any sum expressed in any currency other than that of British India has not either expressly or by implication been conferred on the Commissioner and that under R. 7, the Commissioner can impose assessment in respect of those companies only, the paid-up capital of which is expressed in rupees."

The first question submitted for the opinion of the High Court has been argued at considerable length. The contention of Messrs. Best & Co., Agents of Nobel's Explosives Company, Limited, is that only companies whose share capital is expressed in terms of Indian currency are liable to assessment under R. 7 of schedule IV of the Madras City Municipal Act and the Nobel's Explosives Company, Limited, being an English Company whose share capital is expressed in terms of British currency cannot be brought within the operation of R. 7 of schedule IV. The Nobel's Explosives Company, Limited, has a paid-up capital of £ 2,793,412. It was incorporated in England and it carries on a world-wide business. The question is whether an English Company such as the Nobel's Explosives Company, Ltd., is not liable to be assessed under the Madras City Municipal Act, S. 110, by reason of its share capital being expressed in terms of English Currency and not in terms of the currency in India. S. 110 is under the heading " Tax on Companies " and is in the following terms :—

Every incorporated company transacting business within the city for profit or as a benefit society shall pay by way of licence fee in addition to any other licence fee that may be leviable under this Act a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in schedule IV ; but in no case exceeding one thousand rupees, if and as soon as it has transacted business in the city for the period prescribed in S. 113.

Explanation.—Whenever a company has an office, agent or firm to represent it for purpose of transacting business in the city, such company shall be deemed to transact business in the city and such office, agent or firm shall be liable for the tax in respect of the company's business, whether or not such office,

F. B.

Best & Co
v.
Corporation of Madras

Devadoss, J.

agent or firm has power to make binding contracts on behalf of the company." R. 7 of schedule IV is headed " Part 2—Assessment of Companies—S. 110" and is in the following terms :—" Companies shall be assessed by the Commissioner on the following scale." It has two sub-headings, " paid-up capital " and " half-yearly tax," then another heading.

Lakhs of rupees and a scale.

		Rs.
A. More than twenty		1,000
B. More than ten, less than twenty		500
C. More than five, less than ten		250
D. More than three, less than five		150, etc.,
G. Less than one	...	30

There is also a proviso to the effect " Provided that any company, the head office or a branch or principal office of which is not in the city and which shows that its gross income received in or from the city has not in the year immediately preceding the year of taxation exceeded

(*a*) Rs. 25,000—shall pay only Rs. 125.
(*b*) Rs. 15,000—shall pay only Rs. 75.
(*c*) Rs. 5,000—shall pay only Rs. 25.

It has been conceded, and I think very rightly, by Mr. R. N. Aingar who appeared for Messrs. Best & Co., that if S. 110 stood alone, Nobel's Explosive's Company, Limited, would be liable to pay the tax on companies, but he contended that inasmuch as R. 7 had referred only to paid-up capital in lakhs of rupees, the scope of S. 110 had been narrowed by R. 7. He further contended that there was no provision in the Act for converting capital expressed in terms of foreign currency into the British Indian currency such as that contained in S. 20 of the Stamp Act, and it must therefore be taken that the legislature intended that only companies whose capital was expressed in rupees should be assessed. He further contended that it would be very inconvenient to assess companies under R. 7, when the exchange is fluctuating as it is now and a German Company with a capital of two million Marks may at the present rate of exchange not have a capital of more than a few rupees.

The real question is whether a company not registered in British India and whose capital is not expressed in terms of Indian currency is outside the scope of S. 110. S. 110 is very clear in its terms. It makes every incorporated company transacting business within the city for profit or as benefit

F. B.

Best & Co.
v
Corporation
of Madras

Devadoss, J.

society liable to pay by way of licence fee a half-yearly tax on its paid-up capital on the scale shown in Sch. IV. The scope of S. 110 being wide and the provision being so clear, can it be said that the scope of that section has been narrowed by R. 7? Rule 7 does not contain any expression to the effect that the paid-up capital should be in rupees. All that it says is that if the paid-up capital is more than twenty lakhs, a certain amount of tax is payable and if it is more than ten and less than twenty, a certain other amount is payable and it gives a scale. Can it be said that Nobel's Explosives Company, Limited, has not got a capital of twenty lakhs of rupees? The Commissioner has authority to assess the tax and in his opinion, if a company has a capital of more than twenty lakhs, that company is liable to pay a certain amount half-yearly. Any foreign company whose capital in foreign currency is known, can be easily said to possess a capital of more than twenty lakhs or less than twenty lakhs or any other sum. Looking at the history of this legislation it cannot be reasonably contended that the legislature intended only to assess companies registered in India. In the City of Madras Municipal Act, 1884, provision was made for levying professional tax in S. 103 in these terms : " If the Commissioners determine to levy a tax on arts, professions, trades and callings (not being a military profession or calling), and on offices or appointments, every person who within the city exercises any one or more of the arts, professions, trades or callings, or holds any one or more of the offices or appointments, specified in Sch. A, shall pay in respect thereof the sum specified in the said schedule as payable by persons of the class in which such person is placed." The relevant portion of schedule A is as follows :—" Joint stock companies and other companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds twenty lakhs of rupees 500 rupees." In the Madras City Municipal Act of 1904, S. 115 was enacted for the levy of taxes and tolls. S. 120 of that Act is in the following terms :—" If the corporation determine to levy the tax specified under clause A of S. 115, every person who within the city exercises any profession, art, trade or calling or holds any office or appointment bringing him within one or more of the classes of persons specified in schedule V shall pay the sum specified in the said schedule as payable by persons of the class in which such person is placed." In schedule V (A) the wording of the Act of 1884 is reproduced. In the present Act the

F. B.
Best & Co.
v
Corporation of Madras.
Devadoss, J.

same wording is used with a slight modification. Instead of repeating under the headings of A, B, C, etc., the provisions as to companies, an abbreviated form is introduced with a heading "lakhs of rupees" and the abbreviated forms, more than twenty, more than ten and less than twenty, more than five and less than ten, etc. It is clear from this that the legislature did not intend to alter the law as it stood both under the Act of 1884 and under the Act of 1904. It is to be remembered in this connection that the tax on companies levied by the Corporation seems to have been paid without demur, and it is only now that objection is raised against the assessment under S. 110 and R. 7 of the present Act. Though the conduct of the assessees does not estop them from or stand in the way of raising a legal objection, yet it shows how both the Corporation and the companies understood the provisions of the Acts of 1884 and 1904. It is true that if the amount of tax be small the companies may not take the trouble of objecting to the assessment. But where the half-yearly tax is such a large sum as rupees one thousand, the companies naturally try to escape taxation if they could.

Under the District Municipalities Act, companies not registered in British India or in the British Dominions are not liable to pay the companies' tax. The provisions of that Act are different from those of the Madras City Municipal Act. In the District Municipalities Act of 1884, tax on arts, professions, trades and callings was levied by reason of the provisions contained in S. 53. Schedule A, class I, begins thus :—" Every person holding any office or appointment, public or private, or employed in any capacity, whose pay, salary or pension amounts to Rs. 2,000 a month or upwards, and every person falling under any of the following denominations whose income is estimated to amount to Rs. 2,000 a month or upwards carrying on business as a company, etc., etc." The word " Company " is defined in the Act as meaning " a company registered under the Indian Companies Act, 1882, or under the Acts of Parliament known under the collective title of the Companies Acts, or incorporated by an Act of Parliament or of the Governor-General in Council, or by Royal Charter or Letters Patent." This Act was amended by Act III of 1897. The Amendment Act made no change in the law as regards professional tax. The Madras District Municipalities Act of 1920 was passed to consolidate and amend the law relating to District Municipalities S. 92 of the Act is in these terms " If the Chairman publishes

F B.

Best & Co.
v
Corporation
of Madras

Devadoss, J.

a notification under S. 80 that a companies' tax shall be levied every company transacting business within the municipality for profit or as a benefit society shall after the date specified in the said notification pay a half-yearly tax on its paid-up capital on the scale shown in schedule IV, if and as soon as it has transacted business in the municipality for the period laid down in S. 95. Schedule IV, R. 16 has the heading of " Assessment of Companies " Companies shall be assessed by the Chairman on the following scale :—

Paid-up Capital.	Half-yearly Tax.
A.—More than 10 lacs of rupees	Rs. 250.

and the wording is almost similar to the wording in the Madras City Municipality Act of 1919. In S. 92 of the Act the expression is " every company transacting the business " and the word company is defined as meaning " a company registered under the Indian Companies Act, 1913, or under the Acts of Parliament known under the collective title of the Companies Acts or incorporated by an Act of Parliament or of the Governor-General in Council or by a Royal Charter or Letters Patent." It is quite clear, therefore, that companies which do not come within the definition of the wording as given in the Act are not liable to pay tax on companies. It has been held by Kumaraswami Sastri, J., in C. S. Nos. 796 and 1055 of 1921. that companies like the Singer Sewing Machine Company and the Standard Oil Company of New York are not liable to assessment under S. 92 of the District Municipalities Act in respect of business carried on within the limits of a municipality. In the Madras City Municipal Act there is no definition of company and as S. 110 speaks only of Incorporated Company transacting business within the city, I think that the intention of the Legislature is quite clear and that is to bring within the operation of S. 110 all Incorporated Companies transacting business within the city whether they be incorporated in British India or in the British Isles or anywhere else. The conditions necessary are, they should be incorporated and they should transact business within the city for profit or as a benefit society and should carry on business as required by S. 113, in order to make them liable to the tax on companies. When S. 110 is so clear in its terms, can it be said that its scope has been narrowed by implication only by reason of the expression " lakhs of rupees " being used as regards the paid-up capital in rule 7. The Commissioner is empowered

F. B.
Best & Co.
v.
Corporation of Madras
Devadoss. J.

to tax companies and he has to determine what the capital of a company is. I do not think that there is any insuperable difficulty in the Commissioner arriving at a satisfactory decision as regards the amount of the capital of a company in rupees when that capital is expressed not in terms of Indian currency but of English or foreign currency. Considering the wide margin that is given in the rule, it is not right to hold that companies which have not got a capital expressed in Indian currency are outside the scope of R. 7. Suppose a company is formed and registered in Travancore and its capital is expressed in the currency of the State, *viz.*, Chakrams, or a company is formed and registered in the Native State of Hyderabad and its capital is expressed in terms of Sicca rupees, could not the Commissioner easily ascertain whether such a company carrying on business in the city of Madras has or has not a capital of more than twenty lakhs or less than ten lakhs of rupees or any other sum ? It is urged that the Madras City Municipal Act is a taxing statute and should be construed strictly. It is a well established principle of construction that all penal statutes which impose a penalty, and taxing statutes should be construed strictly :— that is, where it is not quite clear that a subject is liable to a tax or penalty, he should not be made liable by any extended or loose construction of the statute. But this principle does not stand in the way of considering whether a taxing statute embraces within its operation certain classes of persons. Mr. Aingar referred to the observations of Rowlatt, J., in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), " It is urged by Sir William Finlay that in a Taxing Act clear words are necessary in order to tax the subject. Too wide and fanciful a construction is often sought to be given to that maxim, which does not mean that words are to be unduly restricted against the crown or that there is to be any discrimination against the Crown in those Acts. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used. " Applying the observations of the learned Judge to the present case, can it be said that an incorporated company carrying on business within the city of Madras does not come within the operation of S. 110 and R. 7 ? What

1. (1921) 1 K B 64, 71.

F. B.
Best & Co
v.
Corporation
of Madras

Devadoss. J.

is there in the rule to indicate either expressly or impliedly that the expression "Incorporated company" should be held to mean incorporated only in British India ? The words of the statute are clear and when there is nothing in it to imply an intendment to exclude any person or class coming within the clear language of the section, it would be doing violence to that language by importing something not warranted by anything in it or in any other portion of the enactment. The mere fact that the liability of the companies' tax is on its having a capital of certain number of lakhs is no justification for holding that the company should have its capital expressed in terms of Indian currency.

In *Corporation of Calcutta* v. *Standard Marine Insurance Company* (3), an argument was put forward that a company not registered in British India was not liable to be assessed. The learned Advocate-General of the day, Sir Charles Paul, urged this argument :—In the 2nd schedule the words used are, 'the paid-up capital of which amounts to 10 lakhs of rupees or upwards.' The word "amounts" has been advisedly used. It means 'is equivalent to.' Companies with capital in foreign coin are intended to be included." But the point was not decided and it is urged that the Bengal Act was subsequently amended by the inroduction of the words "equivalent to." In my view it is unnecessary to use the words "equivalent to," for all that the rule says is that if the capital is more than twenty lakhs a certain amount is payable, and if less than twenty lakhs of rupees, some other amount is payable. The case of *Charles James Partington* v. *The Attorney-General* (4), was relied upon by Mr. Aingar in support of his contention. The observations of Lord Cairns as to the interpretation of fiscal statutes is entitled to the greatest weight "I am not at all sure that, in a case of this kind—a fiscal case—form is not amply sufficient ; because, as I understand the principle of all fiscal legislation it is this : If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the Crown, seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of the law the case might otherwise appear to be.

3. I L R 22 C 521. 4. L R 4 A C (Eng and Ir.) 100.

F. B.
Best & Co
v.
Corporation
of Madras
Devadoss, J.

In other words, if there be admissible, in any statute, what is called an equitable construction, certainly such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute." A careful perusal of the judgment of the case shows that the House of Lords upheld the contention of the Crown that if two administrations are taken out, stamp duty is payable in respect of both. The facts of the case are One Mary Shard died intestate in England in 1819. No one appeared to administer her estate and Mr. Maule, the then Solicitor to the Treasury, took out letters of administration for that purpose. The next of kin to the deceased was Mrs. Isabel Cook, the wife of Mr. Ellis Cook, both of whom had always been domiciled in the United States. Mrs. Isabel Cook died in 1825. She had not taken out letters of administration to Mrs. Shard. Her husband died in 1830. After his death his children applied to Mr. Partington, to take proceedings against the Solicitor to the Treasury, to recover from him the property which had belonged to Mr. Shard and which they claimed under their mother. Mr. Partington took out separate letters of administration to the estate. .first of Ellis Cook and then of Isabel Cook. Each grant was dated on the 22nd July, 1855 and the form of each was as follows :—" We do grant full power and authority to you to administer and faithfully dispose of the said goods, etc., which belong to his estate." In the grant relating to the mother's estate the concluding words were "For the use, etc., of James Cook now residing in Vermont in North America one of the natural and lawful children of the said Isabel Cook deceased, etc., etc." Mr. Partington then instituted a suit in the Chancery against Mr. Reynolds (who had in the meantime succeeded Mr. Maule as Solicitor to the Treasury) and the Court having found James Cook to be the next of kin declared Mr. Reynolds to be chargeable with the principal sum of assets. The Commissioners of Inland Revenue claimed that stamp duty should be calculated on a value including all accretions from the death of Isabel Cook to the date of the administration, namely, the 23rd July, 1855, and also claimed that the grant of the administration for the effects of the late Ellis Cook, who survived his wife, should be stamped at the same rate. The Court of Exchequer Chamber held that duty was payable in respect of both the estates. The House of Lords affirmed the judgment of the Court of Exchequer Chamber ; when two administrations are granted

F. B.

Best & Co.
v.
Corporation
of Madras

Devadoss, J.

stamp duty is payable on both. Whether the devolution of the estate of one deceased person who has been reduced to possession or not, when administration is sought for the estate of a person on whom some other estate has devolved stamp duty is payable on the values of the estate of the person who died intestate as well as for the administration of the estate of he person on whom the previous estate devolved though he had not taken out letters of administration. Their Lordships construed the provisions of the statute strictly and upon the strict construction both the estates were liable to pay stamp duty. Lord Chelmsford agreed with the Lord Chancellor in the order proposed and observed, " With respect to the liability to the full duty upon both the administrations taken out by the appellant, it was admitted by his learned counsel that if the question had arisen with respect to subjects of this country no doubt would have existed as to the double duty being payable. But it was contended, that as Isabel Cook and her husband Ellis Cook were domiciled Americans, it was not necessary to take out administration to Ellis Cook in order to obtain administration to Isabel Cook ; that the husband was not an interested party ; that the wife's administrator might give a sufficient receipt and discharge ; and that the whole of the duty of the administrator was to remit the money received by him under the administration to America to be distributed there to the person entitled. I must confess my inability to follow this reasoning, or to understand how the question of domicile can enter into the consideration of the grant of letters of administration in this country. "

Mani Mohan Mandal v. *Ramtaran Mandal* (5) was relied upon as authority for the contention that R. 7 controlled the scope of S. 110. In that case, the question was whether a Court had the power of remand not expressly given to it under O. 41, R. 23, of the Civil Procedure Code. S. 107 begins thus ' Subject to such conditions and limitations as may be prescribed an Appellate Court shall have power (*a*) a determine a case finally and, (*b*) to remand a case, etc., ' As prescribed ' means as prescribed by the rules to be framed hereunder. Under O. 41, R. 23, the power to remand a case is limited. Sir Lawrence Jenkins makes the following observations at page 152 :— " The body of the Code is fundamental and is unalterable except by the legislature ; the rules are concerned with details

5. I L R 43 C 148.

F.B.

Best & Co.
v.
Corporation
of Madras

Devadoss, J

and machinery and can be more readily altered. Thus it will be found that the body of the Code creates jurisdiction while the rules indicate the mode in which it is to be exercised. It follows that the body of the Code is expressed in more general terms, but it has to be read in conjunction with the more particular provisions of the rules." S. 110 of the Madras City Municipal Act is not subject to the rules prescribed under that rule or any other provisions of the Act. It simply says that the tax shall be on the scale shown in the taxation rule in Schedule IV. The liability to pay tax is imposed by S. 110; the amount of tax is to be determined according to the scale given in the schedule. So, the rules in Sch. IV cannot take away the liability to pay the tax and a reasonable construction should be placed both upon S. 110 and upon R. 7 in order to avoid a construction, which is repugnant to the object of the section and the rule.

As a good deal of argument has been addressed to us upon the construction of taxing statutes, I shall deal briefly with a few cases, which bear on the point. In Maxwell's Interpretation of Statutes here is this passage at page 410 "When one section enacted that if the plaintiff recovered a sum 'not exceeding' £ 5 he should have no costs, and another, that if he recovered less than' £ 5 and the Judge certified, he should have his costs; the literal meaning of the last clause leaving it inoperative where the sum recovered was exactly £. 5, it was held, to avoid imputing so incongruous and improbable an intention to the legislature, that the words 'less than' should be read as equivalent to 'not exceeding,' the general principle being that Acts of Parliament should be construed with a candid mind and with an intention to understand them—*Gray* v. *Harris* (6). At page 420 there is this following passage:—" So, the XXXV. Geo. III, C. 101, s. 2, which empowered Justices to suspend in case of sickness the order of removal of any pauper who should be 'brought before them for the purpose of being removed,' was construed as authorizing such suspension without the actual bringing up of the pauper before the Justices: as the literal construction would have defeated the humane object of the enactment." In these cases the Court departed from the strict language of the enactment in order to give full effect to the intention of the legislature as expressed in the section and in order to avoid absurd construction, or to prevent anything which is against humane practice.

6. (1852) 21 L J Exch. 160.

I have referred to these cases only for the purpose of showing that the Court is not debarred from giving a reasonable construction to a statute. I am not overlooking the principle that taxing statutes should not receive an equitable construction. In Halsbury's Laws of England, Vol. 27, page 148, the law is sumoned up thus :—" It is the duty of Judges to give fair and full effect to statutes without regard to the paricular consequence in the special case and not to indulge in conjecture as to what Parliament would have done if a particular case had been presented to its notice, for it may be presumed that the framers of a statute contemplated matters of ordinary occurrence."

It has been urged that there is no provision in the Act for converting the foreign currency into Indian currency as is contained in the Stamp Act, as the legislature did not intend to tax companies whose capital is not in rupees. By S. 20 of the Stamp Act an arbitrary date is fixed for conversion of foreign currency into Indian Currency. The Stamp Act imposes an *ad valorem* duty on certain classes of documents and it is necessary to calculate the duty as exactly as could be done, and for that purpose, the legislature has fixed a certain date for such calculation. Under the Madras City Municipal Act, S. 113, the tax becomes payable if the company carries on business for 60 days, and on the expiry of the 60th day the tax could be demanded, and the Commissioner could after that date assess the company under S. 110, R. 7. It is not likely that there could be any great fluctuations in the course of a month or two, and the extraordinary conditions prevaling in Germany and in Austria now should not be taken to be the ordinary conditions prevailing in the exchange market. Owing to extraordinary circumstances the mark has depreciated very much and similarly the Austrian and Russian currency. But till two years ago, there were not such abnormal conditions prevailing and there would be no hardship if there is a slight fluctuation in the value of the foreign currency in relation to the Indian currency, between the dates on which the company becomes liable to pay the tax and the date on which it is assessed. In *Hyde* v. *Johnson* (7), the facts were "The plaintiff in order to recover a debt barred by the statute of limitation, offered in evidence at the trial before the Under-Sheriff a letter written by the defendant's wife, in her husband's name at his request,

7. 2 Bing. N. C. 776.

offering to pay the duty by instalments and sent by him to the plaintiff. The evidence was objected to as not signed by the party 'chargeable thereby' wihin the meaning of 9 Geo. IV, c. 14, S. 1." Tindall, C. J., upheld the contention and observed as follows :—"The question turns entirely on the construction of the statute and it amounts in oher words to this: does the Statute 9 Geo. IV, c. 14, extend to a writing signed by the pary chargeable thereby?' Looking at the words of the statute, it is confined in terms to a writing 'signed by the party chargeable thereby.' * * * * * Some inconveniences have been pressed in the course of the argument upon our attention in cases where a total inability of parties to sign may exist; but the nature of the signature which is necessary to comply with the requisites of the statute is such as to make it almost impossible to suppore a case in which a party could not make such a signature as would satisfy the statute. And after all, in construing a statute we must not look to cases of very rare and singular occurrence but to those of every day experience, and whatever may be the consequence, we must interpret the statute according to the plain import of the language employed in it In *Re Hall and others* (8), Cave, J. observes with regard to S. 19 of the Patents, Designs and Trade Marks Act of 1883 " I am unable to see in what way our interpretation of the language of the section can work injustice. A very strong case of injustice arising from giving the language of an Act of Parliament its natural meaning must be made out before the Court will construe a section in a way contrary to the natural meaning of the language used; and it will be no injustice if the result of our decision be to deprive the person who infringes a patent of the right to set up a defence which does not go to the merits."

Earl Cairns gives the reason for a strict construction of Taxing Acts in the following terms in *Pryce v. Monmouthshire Canal and Railway Companies* (9) :—"My Lords, the cases which have decided that Taxing Acts are to be construed with strictness and that no payment is to be exacted from the subject which is not clearly and unequivocally required by Act of Parliament to be made, probably meant little more than this, that inasmuch as there was not any *a priori* liability in a subject to pay any particular tax, nor any antecedent relationship between the tax-payer and the taxing authority, no reasoning

8. (1888) 21 Q B D 137. 9. L R 4 A C 197.

founded upon any supposed relationship of the tax-payer and the taxing authority could be brought to bear upon the construction of the Act, and therefore the tax-payer had a right to stand upon a literal construction of the words used, whatever may be the consequence." It is contended by Mr. Doraiswami Ayyangar on behalf of the Corporation that for the privilege of trading within the city, the tax is payable. It is unnecessary to consider whether the amenities of the city are a sufficient *quid pro quo* for the tax payable by the company. In this connection it may be instructive to see how American Courts construe legislation of this kind. "In America, Revenue Laws are not regarded as penal laws in the sense that it requires them to be construed with strictness in favour of the defendant. They are regarded rather in their remedial character as intended to prevent fraud, suppress public wrong and promote public good and so construed as to most effectually accomplish those objects." Maxwell's Interpretation of Statutes, 6th Edn., page 509. Without subscribing to the doctrine embodied in the above passage, I think a reasonable construction should always be adopted without straining the language either in favour of one party or the other.

An argument has been advanced by Mr. Aingar that the Registrar of Joint Stock Companies would refuse to register the memorandum of a Company in which the capital is expressed in terms not of British Indian Currency but of some other currency on the ground that there is no machinery by which he could convert the foreign currency into Indian Currency and that the forms appended to the Act contain words and expressions which are applicable only to the Indian Currency. Whether the Registrar would refuse to register a Company whose share capital is expressed in a foreign currency or not is a question which need not be considered here.

In the year 1884, there could not have been many companies registered under the Indian Companies Act trading within the city of Madras and the Legislature could not be said to have overlooked the fact that there were a number of English and American Companies trading within the city of Madras, and that it intended that the scope of the enactment in 1884 should be limited to the Indian Companies only. Considering the long time that has elapsed since the Act of 1884 was passed, and considering the fact that no attempt was ever made so far as it was brought to our notice, to dispute

F. B.

Best & Co.
v.
Corporation of Madras.

Devadoss, J.

the liability of the Company to pay Companies' tax, is it reasonable to suppose that the intention of the Legislature was not to tax all incorporated Companies? The inconvenience that may be felt in one or two cases in converting foreign currency into Indian currency for the purpose of assessment need not stand in the way of a reasonable construction of the Statute. There may be companies incorporated according to the law of Brazil or Japan or any other country, but if it is an incorporated Company, it is liable to pay the tax if it comes within one of the classes mentioned in R.7. It is always open to the Company to show that the estimate of the Commissioner is wrong, and there is an appeal provided to the Standing Committee against the decision of the Commissioner. I think the Legislature used the expression "incorporated Company" in S. 110 of the Act advisedly while it used the word "company" in the corresponding provision of the District Municipalities Act, 1920. In the City of Madras Municipal Act, 1884, and in the Madras City Municipal Act, 1904, the expression used is "Join Stock Companies and other Companies." In the District Municipalities Acts of 1884, of 1897, and of 1920 the Legislature used the word "Company" in the Act and gave a definition to it. To uphold the contention of Messrs. Best & Co., would be to impute to the Legislature an intention to tax companies incorporated in England if they carry on business within the limits of any Municipality in the mufassil and not to tax them if they carry on business in the city. Surely such an intention cannot be imputed to the Legislature when it is remembered that more British and Foreign Companies carry on business in the city than in any Municipality in the mufassil.

After an anxious consideration of the question I am of opinion that an Incorporated Company in order to be liable to taxation under S. 110 and R. 7 of the Madras City Municipal Act need not have its capital expressed in terms of the Indian Currency and that all Incorporated Companies are liable to assessment under S. 110 and R. 7. In the view I hold, it is unnecessary to express an opinion as regards points 2 and 3.

The Court.—As we have come to different conclusions and the matter falls within R. 2, cl. (3) (*a*) of the Appellate Side Rules, we refer the first of the questions referred to us to a Full Bench for decision.

Nugent Grant and *R. N. Aingar* instructed by *Messrs. King and Partridge.*

F. B.

Best & Co. v. Corporation of Madras.

Sir Walter Schwabe, C J.

P. Duraiswami Ayyangar for the respondent.

The Court expressed the following

OPINION :—*The Chief Justice* :—The question for decision is whether an English company with sterling capital is liable to assessment under the heading "Tax on Companies" under the Madras City Municipal Act, IV of 1919. This depends on the proper interpretation of S. 110 and of R. 7 of Sch. IV which must be read together. That section runs Every incorporated company transacting business within the City for profit .shall pay by way of licence fee a half-yearly tax on its paid-up capital on the scale shown in the taxation rules in Sch. IV but in no case exceeding rupees one thousand, if and as soon as it has transacted business in the city for the period prescribed in S. 113." Turning to R. 7 of Sch. IV it runs "Companies shall be assessed by the Commissioner on the following scale :—

Paid-up capital—lakhs of rupees.	Half-yearly tax.
A. More than twenty	Rs. 1,000.
B. More than ten, less than twenty	Rs. 500.

etcetera." This has been slightly amended by the Madras Act VII of 1922, which substituted "twenty and more than twenty" and "ten and more than ten" for the words under (A) and (B), the object being to bring in to tax companies whose capital was exactly twenty or ten lakhs which might have been excluded by the use of the words "more than" and "less than."

The principle of construction to be applied to taxing statutes is that, if the words of the statute are capable of two otherwise equally opposite constructions, the construction to be adopted is that in favour of the taxpayer but, to ascertain whether the two possible constructions are equally opposite, the ordinary rules of construction of statutes are to be applied. As pointed out by Rowlatt, J. in *Cape Brandy Syndicate* v. *Inland Revenue Commissioners* (1), the maxim that clear words are necessary in order to tax the subject does not mean, as often contended, "that words are to be unduly restricted against the taxing auhority. It simply means that in a taxing Act one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used." That was enunciating no new principle, and I think the matter was clearly stated by Lord Russel, C. J., in

1. (1921) I K B 64.

F. B.
Best & Co.
v.
Corporation
of Madras.
Sir Walter
Schwabe,
C. J.

Attorney-General v. *Carlton Bank* (10) when he said, "I see no reason why special canons of construction should be applied to any Act of Parliament, and I know of no authority for saying that a Taxing Act is to be construed differently from any other Act. The duty of the Court is, in my opinion, in all cases the same, whether the Act to be construed relates to taxation or to any other subject, namely to give effect to the intention of the legislature as that intention is to be gathered from the language employed, having regard to the context in connection with which it is employed. The Court must no doubt ascertain the subject matter to which the particular tax is by the statute intended to be applied, but when once that is ascertained, it is not open to the Court to narrow or whittle down the operation of the Act by seeming considerations of hardship or of business convenience or the like. Courts have to give effect to what the legislature has said." Now, in this case, we have to see what was the intention of the legislature to be deduced from the words used and the surrounding circumstances. The Act purports to impose a tax on every incorporated company (which words it is admitted includes English companies) carrying on business within the city, and in terms imposed on its paid-up capital a tax on the scale shown in the rules in the schedule. So far the language clearly indicates an intention to tax all incorporated companies. Turning to the rule in the schedule, we find that the company has to pay license fee at a varying rate in rupees according as its capital is more or less in lakhs of rupees, or, in cases where the capital is an exact amount reckoned in lakhs, then, by the amended Act, on that amount. It is contended that that limits the application of the tax to companies whose capital is in shares of a rupee denomination. I do not think that that is the plain meaning of the words of the statute, or the proper interpretation to be put upon those words, even though they are capable of bearing that construction. I think it is merely stating the scale in the terms of the currency of this country and I see no difficulty at all in answering the question, how many lakhs of rupees is the capital of an English company with a capital, say, of a million pounds sterling ? Given the rate of exchange, it merely provides a simple sum in arithmetic. I entirely fail to see how, in stating the scale by reference to the capital in the currency of the taxing country, it can be properly construed to exclude all companies whose nominal capital is usually expressed in the currency

10. (1899) II Q B 158 at 164.

F. B.
Best & Co
v.
Corporation of Madras.
Sir Walter Schwabe, C. J.

of some other country. I am not sure that there would be anything illegal or impossible in an Indian Company registering itself under the Act with its capital in pounds or francs, and if it could do so, it would, under the construction contended for, escape the tax. If it had been intended by the legislature to tax only Indian Companies with a rupee denomination of capital, the natural place for such limitation would have been in the section itself and the words would have been "Every Incorporated Company with a capital in rupees, etc.," or at the very least, if such exclusion was intended, one would expect to find it when it is not in the section, then in the schedule by a definite explanation or proviso that Companies with capital denominated in foreign currency should not be liable to the tax. Nor is it, in my view, an irrelevant consideration that the construction contended for would involve the intention of the legislature having been to give a preference in trade to foreign over local companies : if it has done so by clear words, that consideration might be irrelevant but in my view, so far from being clear in that direction, the words used are capable of, and indeed properly bear, the opposite construction.

The answer to the question referred to us must be in the affirmative and the company is liable to be assessed to the tax.

Coutts Trotter, J.

Coutts Trotter, J.—I do not think anybody could have any doubt as to what was the intention of the section and the rule which we are asked to construe. To my mind, to hold that the legislative body which passed this Act could have intended to discriminate against indigenous companies in favour of foreign companies, because that would be the inevitable result of the construction contended for, is one that is incapable of argument. Mr. Grant has, I think, very wisely put his case upon the ground that the draftsman of the Act, owing to his carelessness, had in fact defeated the intention of the framers of the Act. How great that carelessness was it is almost impossible to imagine. There was in a case in *Corporation of Calcutta* v. *Standard Marine Insurance Company* (3), which was under the Calcutta Municipality Act of 1888 in which exactly the same point was argued, though not decided, as has been raised before us. That was in 1895, and in 1899 a new Act was passed for the Calcutta Municipality

3. I L R 22 Cal. 581.

F. B.
Best & Co.
v.
Corporation
of Madras.
Coutts
Trotter, J

and in that Act *ex Majori Cautela* words were inserted to prevent the opporunity for an argument, such as we have heard today. That the draftsman of the Madras Act should not have taken the trouble to cast a glance over the Acts of other big Municipalities before he set his hand to his task is to my mind almost incredible ; but so it appears to be and we are therefore left with a problem which ought never to have arisen had the Act been drafted with reasonable care. I do not accede to Mr. Grant's argument because I think that the utmost that you find is the absence, so to speak, of a table for the commutation of foreign coinage into the coinage of the country, and it seems to me that that failure is not enough to defeat the plain intention of the governing S. 110, because it appears to me that the Act might well contemplate that any taxing authority in any country can always by a not very difficult feat turn the coinage of one country into the terms of the coinage of the country where the Act is passed and where the tax is received. It appears to me therefore that, just as I should be prepared to hold in England that where an Act expresses the capital in pounds a French company with capital in francs could be assessed, so here in India, where the rupee is the standard basis, the taxing authorities are not prevented, in the absence of an express provision to the contrary, from performing the feat of converting the coinage into different terms. I may add that, having regard to the rates of exchange as they have been in later years, it is almost inconceivable to imagine an Act fixing anything in the nature of a table except by reference to some date on which the rate of exchange is to be fixed. It appears to me that it is suite clear that the Act supplies that omission by giving a definite date, the date at which the tax falls due. For the purpose of R. 7 of Schedule IV I take it that the rate of exchange at the date when the tax falls due must be taken into consideration. I may add that I entirely sympathise with the grievance of the company with regard to the method of imposing the tax, for a more unjust method of taxing than to tax a company upon the whole of its subscribed capital in every place where it carries on trade is, to my mind, difficult to imagine. It is really a very great hardship but one that can only be set right by the legislature. I may add that, though there is a mitigation of the hardship in part by the maxima fixed by R. (7) nevertheless those maxima do not apply to a very large class of cases as Mr. Grant has pointed out.

I agree with the answer proposed by my Lord.

Ramesam, J.—I agree with the judgments just pronounced and that the answer to the question referred to us must be in the affirmative.

C. A. S. *Question answered in the affirmative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE RAMESAM.

Anantalal Damani *Petitioner** (*1st Respondent in O. S. Appeal No. 53 of 1922 on the file of the High Court.*)

v.

Surjimull Murlidhar Chandick and another *Respondents* (*Appellant and 2nd respondent in do.*).

Civil Procedure Code, Ss. 109 (c) and 110—Leave to appeal to His Majesty in Council—"Substantial question of law"—Acknowledgment of debt.

Where following other cases previously decided, the High Court held that an asknowledgment of a debt was not given to supply evidence of such debt within the meaning of Art. 1 of Sch. I of the Stamp Act, it cannot be said that the case is of public or great private importance or such an important precedent as to justify the grant of leave to appeal to His Majesty in Council under S. 109 (*c*) of the Civil Procedure Code.

Raja Rajeswara Setupathi v. *Thiruneelakantam Servai,* 44 M L J 217 foll.

Petition praying that in the circumstances stated there in the High Court will be pleased to grant leave to the Petitioner to appeal to His Majesty in Council, against the judgment and order of the High Court dated 23rd April 1923 in O. S. Appeal No. 53 of 1922 preferred against the judgment of the Honourable Mr. Justice Phillips dated 28th February 1922 and passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 824 of 1920.

V V Srinivasa Iyengar instructed by *Messrs Grant* and *Greatorex* for petitioner.

K. V Sesha Iyengar and *R. Purushothama Iyengar* for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice*:—This is an application for leave to appeal to the Privy Council in a case which is under Rs. 10,000. The question, therefore is whether, under S. 109 (c) of the Code of Civil Procedure, we can certify it to be a fit case for appeal to His Majesty in Council.

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* C M P No. 3470 of 1923. 15th November, 1923.

Anantalal Damani v. Surjimull Murlidhar Chaudick.

Sir Walter Schwabe, C. J.

To quote my own words in *Raja Rajeswara Sethupathi* v. *Thiruneelakantam Servai* (1) "What is contemplated is a class of cases in which there may be involved questions of public importance, or which may be important precedents governing numerous other cases, or in which, while the right in dispute is not exactly measurable in money, it is of great public or private importance." The point in dispute in this case is whether a certain acknowledgment which was given of a debt was given in order to supply evidence of such debt within the meaning of Article I of Schedule 1 of the Stamp Act, because, if so, not having been properly stamped, it would not be admissible in evidence at all. We held, following other cases, that the question for determination was whether the dominant intention of giving that acknowledgment was to supply evidence of the debt or something else ; and we hold that, under the circumstances of this particular case, it was not the dominant intention and, therefore, the acknowledgment was admissible. This may be right or may be wrong in law, or it may be the right or wrong view of the facts of the case. But I cannot think that it is a case of public importance or of great private importance ; nor do I think that it is an important precedent which would govern numerous other cases. The point has been decided before, and most of the cases on the subject are on the same lines as this judgment. I do not think that this is a case within the meaning of the section. If it is desired to litigate this point before the Privy Council, we still have to wait until a case of sufficient magnitude and importance to make it appealable has arisen.

This application must be dismissed with costs.

Ramesam, J

Ramesam, J. :—I agree.

A. V. V *Application dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Arunachala Goundan *Appellant* (Petitioner-defendant).*

Swaminatha Aiyar *Respondent (Respondent Plaintiff's L. R.)*

Arunachala Goundan v. Swaminatha Iyer.

Civil Procedure Code, S. 47—Execution of decree—Application by decree-holder's legal representative—Defences open on—Estoppel personal to legal representative if open—Agreement prior to decree—Plea of, if open.

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*A A A O No. 1 of 1923. 22nd August, 1923.

1. (1923) 44 M L J 217.

Arunachala Goundan v Swaminatha Iyer.

The judgment-debtor can raise in bar of an application for execution presented by the legal representative of the decree-holder any defence such as that of estoppel which is personal to the legal representative.

In execution proceedings started by the legal representative of the decree-holder, *held* that the Court below erred in refusing to allow the judgment-debtor to set up any agreement prior to decree and in directing him to seek his remedy in a separate suit.

Appeal against the order of the District Court of Coimbatore in Civil Appeal No. 232 of 1922 preferred against the order of the Court of the District Munsif of Dharapuram in C. M. P. No. 99 of 19p2 (E. P. R. No. 688 of 1921)—Original Suit No. 697 of 1917 on the file of the Court of the District Munsif of Udumalpet.

T. S. Ramaswami Aiyar and *V Sundaram Aiyar* for appellant.

K. P. Mahadeva Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The finding of the Lower Appellate Court that Swaminatha Iyer is the legal representative of his mother Seethalakshmi the deceased decree-holder, is not and cannot now be challenged.

The District Judge's refusal to allow the appellant to set up in these execution proceedings any agreement prior to decree and his direction to the appellant to seek his remedy in a separate suit cannot however be supported. S. 47 of the Code of Civil Procedure is wide enough to permit any valid objection to be taken by a judgment debtor to the execution of a decree by a decree-holder or the decree holder's legal representative.

It was held in *Chidambaram Chettiar* v. *Krishna Vathiar* (1) by a Full Bench of this Court that even an agreement made prior to the decree as to the manner in which the decree should be executed after it was passed could be pleaded as a bar to the enforcement of the decree as it stood. Here the judgment debtor can raise in bar of Swaminatha Iyer's application to execute the decree obtained by his mother any defence such as that of estoppel which is personal to Swaminatha Iyer because the latter now combines in his own person not only those rights to which he has succeeded in consequence of his mother's death but also those obligations to which he has rendered himself liable in consequence of his separate agreement with the judgment debtor.

The appeal is allowed on this point and the District Munsif is directed to hear and determine the execution petition after

*A A A O No. 1 of 1923. 22nd August, 1923.

1. (1916) I L R 40 M 233 32 M L J 13 (F B).

Arunachala Goundan v. Swaminatha Iyer.

allowing the judgment debtor to put forward a valid defence that he may see fit to raise in the execution proceedings. The Civil Miscellaneous Second Appeal is allowed with costs in this Court.

A. S. V. *Second Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE ODGERS.

V. N. P. Kumaraswami Nadar *Appellant** (*15th Respondent*).

v.

Venkatasami Koundan ant another *Respondents* (*Appellants*).

Kumaraswami Nadar v Venkatasami Koundan

Provincial Insolvency Act of 1920, S. 68—Application by creditor to District Court under—Parties—Official Receiver—Non-joinder of—Effect—Evidence taken by Official Receiver—Use of, at hearing of application—Permissibility—Evidence additional—Admission of—Power of District Court.

A creditor whose claim had been disallowed in part by the Official Receiver applied to the District Judge under S. 68 of the Insolvency Act against the order of the Official Receiver. All the other creditors of the insolvent were made parties to that application, and opposed the same ; but the Official Receiver was not made a party. The District Judge allowed the entire claim of the applicant. On an appeal preferred by one of the opposing creditors against the order of the District Judge, *held,* (1) that his order was not vitiated by the fact that the Official Receiver was not made a formal party respondent to the application before him ; and (2) that he was entitled to act on the evidence given before the Official Receiver.

There is no provision in the Act obliging the District Judge in such a case to take fresh evidence, though it is open to him to do so if he thinks fit.

The fact that a creditor gives up his security and agrees to treat himself as an unsecured creditor for the amount due to him is not conclusive on the question that the money was not due as a personal debt.

Appeal against the order of the District Court of Madura in C. M. P. No. 281 of 1920 in claim No. 22 of 1918 (on the file of the Official Receiver) in I. P. No. 12 of 1914 on the file of the District Court, Madura.

K. S. Champakeswara Iyengar for appellant.

K. V Venkatasubramania Iyer for respondent.

The Court delivered the following

JUDGMENT :—This appeal arises from an application made by the 7th creditor in the Insolvency proceedings of one Thirumula Goundan. The seventh creditor claimed to prove for Rs. 7,000. The Official Receiver allowed the claim in part

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*Appeal Against Order No. 406 of 1921. 11th October, 1923.

Kumara-Swami Nadar v. Venkatasami Koundan.

but disallowed it in respect of the amount claimed under the promissory note Ex. B. The creditor then applied to the District Judge under S. 68 of the Insolvency Act against the order of the Official Receiver and prayed that the whole of his claim may be allowed. The learned District Judge, after considering the circumstances of the case and the evidence, has granted him his prayer ; and the present appeal is by the 15th respondent, one of the other creditors.

Two points have been taken before us as vitiating the order of the District Judge altogether. The first is that the order was passed without making the Official Receiver a formal party to the application before the District Judge. The creditors apparently were all made parties and notice had been given to all the creditors including the 15th respondent, the appellant now before us. He appeared before the District Judge and opposed the claim of the 7th creditor. Apparently the Official Receiver was not made a formal party respondent to the application before the District Judge, but we do not think that that can be treated as in any way materially affecting the order of the District Judge. It was open to any of the creditors either to appeal themselves as the 15th creditor did to oppose the proof tendered by the 7th creditor before the District Court or to have moved the Official Receiver to represent the whole party of creditors before that Court and to state their objections to the proof tendered. The Official Receiver is after all an officer of the Court and there is no provision in the Insolvency Act, so far as we can see, which makes it obligatory on the District Court to have the Official Receiver made a formal party to these proceedings. If the Official Receiver wanted to be heard, there would have been no difficulty whatsoever in the matter as we have no doubt that the District Judge would have heard him. The Official Receiver has been made a party to this appeal before us, but he has not come here, and complained that he has been prejudiced in any way by his not being heard on this matter in the lower Court. Reliance has been placed on *Mangalur Sivaramayya* v. *Singumahanti Bhujanga Rao* (1) by the appellant's vakil in favour of his contention but there we notice that the Official Receiver was directed to execute a document in favour of the creditor who required that the whole of the assets of the insolvent should be transferred to him in accordance with an agreement which he

1. 18 M L T 200.

Kumaraswami Nadar v. Venkatasami Koundan.

entered into with the insolvent before the insolvency. Whether in such a case as that the Official Receiver should be formally made a party and his objections heard or not we need not consider here, for, in the present case we see no reason why the Official Receiver should have been made a formal party as, in the circumstances of this case, it was, as already stated, open to him to have come up and stated any objections that he might have had to the proof tendered. We may state that he knew of the proceedings that were going on in the Insolvency Court itself. In these circumstances the first objection is not a valid one and is overruled.

The next objection is that the District Judge acted upon some statements made by the parties before the Official Receiver. Here again the District Judge was considering the propriety of the action of the Official Receiver which he had taken, as the evidence that was laid before him and the question which the District Judge had to decide was whether, on that evidence, the order of the Official Receiver was a right one and should be supported.. The case cited by the appellant's vakil, *Chinna Meera Rowthan* v. *Kumarachakravathy Iyengar* (2) had reference to an application under S. 36 of the old Insolvency Act and related to the annulment of a document which the Official Receiver had applied to the Court to annul. The Official Receiver was himself the applicant and it was held that any statement taken by him could not be treated as evidence because the matter itself was being tried before the District Court as a matter between the alienee on the one side and the Official Receiver on the other. Such is not the position here at all. Here the District Judge is merely considering the correctness of the order of the Official Receiver, and in such a case as this we do not see any objection to the District Judge acting on the evidence given before the Official Receiver. Nor is there any provision in the act itself for necessitating the District Court to take fresh evidence in such matters. We do not say that it would not have been open to the District Court to take such evidence, if it thought desirable to do so, but there is no provision laying down any obligations on the District Court to do so. In these circumstances, the two objections that have been raised to the order of the lower Court fail.

On the merits the only argument addressed to us is that, as in a previous annulment proceeding this creditor had given up

2. (1916) 36 I C 906.

Kumaraswami Nadar v. Venkatasami Koundan.

his interest in the land so far as his mortgage was concerned and agreed to treat himself as an unsecured creditor for the amount of consideration which, he should prove like any other creditor his claim must be looked upon with suspicion. What the exact reason for his doing so was we do not know ; but the fact that he did so cannot be taken as conclusive on the question that the money was not due as a personal debt.

No other ground has been alleged against the order of the District Judge. We therefore confirm that order and dismiss this appeal with costs of the 7th creditor to be paid by the appellant, the 15th creditor.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Pir Pacha Saheb and another *Appellants** (*Plaintiffs.*)

v.

Mohammad Ruhimuddin Sahib and others . *Respondents* (*Defendants.*)

Pir Pacha Saheb v. Mohammad Ruhimuddin Sahib.

Religious Endowment—Public Endowment—Evidence of—Inam Statement—Inam register—Relative values of—Devadayam—Description of Inam as—Effect of—Civil Procedure Code, S. 92—Scheme-suit for, and for removal of trustees—Decree in plaintiff's favour owing to default of prosecution of defence—Setting aside of—Jurisdiction—Scheme—Framing of—Decree for, when granted.

An Inam Statement is only a statement made by a party to the enquiry before the Inam Commissioner and is merely an assertion of his alleged title before a tribunal which has to decide it. The Inam register on the other hand, embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on other evidence. The recitals in the inam register are therefore of greater evidentiary value than the entries in the Inam Statement.

Where or not the word 'Devadayum' implies a public endowment, there is no doubt that the use of the word 'Devadayam' is a very strong piece of evidence that the inam in connection with which the word is used is a public endowment.

Held, on the evidence, that the institution in question was a mosque.

Where, in a suit for framing a scheme for a mosque and for the removal of the defendants from their trusteeship, it appeared that the defendants had not applied the inam granted for the mosque in the proper manner and that they had denied the title of the mosque to the inam, *held* that the defendants ought not to be allowed to continue to manage in the same way as before and, that it was necessary to frame a scheme for the management of the trust.

Quaere whether when in such a suit a decree is given in favour of the plaintiffs owing to the failure of the defendants to prosecute their defence, the Court has jurisdiction to revise its original order.

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*Appeal No. 282 of 1920. 10th October, 1923.

Pir Pacha Saheb v. Mohammad Ruhimuddin Sahib

Appeal against the decree of the Court of the Additional. Subordinate Judge of Ellore, in O. S. No. 41 of 1919 (O. S. No. 45 of 1918, Subordinate Judge's Court, Ellore).

V Suryanarayana for appellants.

T. S. Ragunatha Rao and *T S. Srinivasa Rao* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs appeal against the decree dismissing their suit for framing a scheme for a Mosque in Palacole and for the removal of the defendants from their trusteeship. At first a decree was given in favour of the plaintiffs owing to the failure of the defendants to prosecute their defence, but subsequently this order was set aside as being an *ex parte* decree and now the Subordinate Judge has dismissed the plaintiff's suit.

An objection has been taken by the appellants that the Subordinate Judge had no jurisdiction to revise his original order and that on that ground the appeal should be allowed. We have, however, heard the appeal on its merits and as we are in favour of the appellant's contention on the merits, it is unnecessary to decide the other point.

The earliest evidence in regard to the Mosque is the proceedings before the Inam Commissioner. We have the inam statement put in by defendants' ancestor, Ex. VI, and the inam register, Ex. A. The learned Subordinate Judge appears to have considered that the statement was, if anything, of more importance than the register and, therefore, has not considered that the recitals in the register are as important as they really are because he says that they must be explained by the entries in the inam statement. It has, however ,to be remembered that an Inam statement is only a statement made by a party to the enquiry and is merely an assertion of his alleged title before a tribunal which has to decide it. The inam register embodies the result of the finding of the Inam Commissioner based partly on the statements put in by the parties and partly on other evidence and, as appears from Ex. A in this case, the other evidence consisted of documents going back to 1812. There is practically no other document of title in this case and we must look to this inam register to see what the facts are. It is contended for the defendants that there is no mosque at all in Palacole but only a Peerla panja and that this Peerla panja has been loosely called Peerla Muzid and that is the reason why we find the word

Pir Pacha Saheb v. Mohammad Ruhimuddin Sahib.

Mosque used with reference to the plaint institution. This theory has been accepted by the learned Subordinate Judge and he has held that there is no Mosque but only this Peerla panja which apparently he considers to be a private institution. If we look at Ex. A, we find, in the first place, that the inam is described as "Devadayam" and there is the authority of this Court in *Muhammad Jafar* v. *Muhammad Ibrahim* (1) that the word Devadayam implies a public endowment ; and whether this is correct or not, there is no doubt that the use of the word Devadayam is a very strong piece of evidence in favour of holding that the suit endowment is a public endowment. There is nothing to contradict this evidence. The defendants have not even produced the inam title-deed and in 1859 they alleged that their sannad has been lost in a cyclone. We start then with the assumption that it is an inam granted for a public charity. The purpose is given as "for the support of the Mosque." There is no question here of the meaning of the word (Maseethu) which appears to be a Telugu form of the Hindustani Masjid, for the inam register is in English and it may fairly be taken that when the word "Mosque" is written the word Mosque is intended and not the word "panja" as is suggested for the defendants. Even in the defendants' inam statement there is no mention of panja, but in the first column he uses the word (Maseethu) ; he does not even use the words which we find in later documents Peerla Masidu, although he says that the purpose for the grant was for holding "Peerla *Utsavam* and other things." This statement possibly explains the introduction of the subsequent word (Peerla Maseethu) which seems from the evidence to be contradiction in terms for it is admitted that the Peerla are never kept in a Masjid. Then we have also a report of the Tahsildar, Ex. XIII, and this is a report in reference to a claim by the defendant to a portion of the site surrounding the plaint institution. It is a report of a Muhammadan Tahsildar and he also used the word "Mosque" to describe the owner of the site. He does mention the words "Peerla Mollalu" in his report, but that is clearly a quotation from the house-tax register. In view of this evidence and the fact that there is no documentary evidence at all to show that the institution was a panja, we think that it must be deemed to be a mosque as is distinctly recited in the inam register. The subsequent confusion in the language, chiefly used by Hindus, when it was called (peerla Maseethu) may be due to

1. (1900) I L R 24 M 243.

the fact that not only was there a Mosque but also that a Peerla *Utsavam* was performed in the same compound and when as is alleged by the plaintiffs the Mosque became demolished the idea of the Peerla remained more strongly in the minds of the neighbours. Otherwise, it is difficult to account for this curious term. The oral evidence cannot be said to be very satisfactory on either side, but there is one point which is in favour of the plaintiffs and that is that they have examined several Muhammadan witnesses living at Palacole who support their case that there used to be a Mosque in the suit compound, that it has been now demolished and that there is only a panja or Muzavarkhana existing. There are three Muhammadans examined on the defendants' side but none of them resides in Palacole and it is not very easy to believe their statements when they say that they know all the details about the Palacole village in which they do not seem to have spent very much time. The other witnesses are Hindus mostly of the Telegu caste, and it is suggested for the plaintiffs that they are all connected with a certain gentleman of their caste named Annamalaiswami who certainly took a considerable interest in the hearing of this case. Whether that is or is not the reason for their giving evidence it is clear from a perusal of their deposition that not very much weight can be attached to their evidence that a mosque never existed in Palacole. Relying on the oral evidence for the plaintiffs in support of their case and the inam register we come to the conclusion that the original endowment was undoubtedly made for the Mosque. That being so, the defendants have no beneficial interest in the inam unless they can prove the same and that they have entirely failed to do. The only document they have produced is a partition deed under which they divided their other property and agreed that out of the proceeds of the suit inam Rs. 50 should be set aside for the Peerla *Utsavam* and that the balance of the income should be divided annually amongst themselves. This is no doubt a claim to a beneficial interest, but it is not supported by any title-deed or any other evidence of any weight.

As the defendants have not applied the inam in the proper manner and have denied the title of the Mosque to the inam, it is impossible to allow them to continue to manage in the same way as before and it will be necessary to frame a scheme for the management of the trust. Although the endowment is undoubtedly made to the Mosque, the claim put

Pir Pacha Sahib v. Mahomad Ruhimuddin Sahib

forward by the defendants' ancestor in 1859 and subsequent events show that it is quite possible that the institution also included the Peerla panja, which admittedly has been in existence for a considerable time past and is alleged by the defendants to have been in existence even prior to the inam enquiry. Therefore, in framing the scheme it will be necessary to provide also for the upkeep of this panja out of the income of the inam.

As regards the item of 25 cents of site near the Mosque, it was held after an enquiry in 1905 that this piece of land belonged to the defendants and not to the Mosque. There is really no evidence for the plaintiffs to show that this decision is wrong, and as the defendants have been in possession of it for over twelve years before suit, we are not prepared to disturb that possession now.

As regards the scheme the parties will be asked to submit a scheme and one of the conditions will be that there shall be three trustees one of whom shall be a member of the defendants' family and the other two appointed by the Subordinate Judge's Court. The case will be adjourned for a week in order to have the scheme submitted for orders.

And this appeal again coming on for hearing this day after submission of a scheme, the Court delivered the following

Judgment :—A scheme has now been submitted which, with slight modifications, we have accepted. In allowance of the appeal there will therefore be a decree in favour of plaintiffs for the recovery of possession of the suit lands, except the 25 cents referred to, for the removal of defendants from trusteeship and for framing of a scheme as already approved.

Plaintiffs will get their costs in both Courts out of the estate, and defendants will bear their own costs.

A. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

K. C. Manavikraman *alias* Anujan Raja Averghal ... *Appellant** (*Petitioner-2nd plaintiff*).

v.

N. C. Ananthanarayana Ayyan and others ... *Respondents* (*Respondents Nos.* 1, 5, 6, 7 *and* 53-*Defendants Nos.* 1, 5, 6, 7 *and L. R. of 4th defendant, deceased*).

Manavikraman. *v.* Ananthanarayana Ayyan.

Civil Procedure Code. Ss. 37 *to* 39—*Territorial jurisdiction—Transfer of, between passing of decree and executing of it—Jurisdiction of Court passing decree to order delivery of property in execution—Transfer of jurisdiction between filing of execution application and order for delivery of property in execution—Validity of order—Submission to jurisdiction by judgment-debtor—C. P. Code, S.* 21—*Execution Proceedings—Applicability to.*

A decree for redemption of a kanom demise was passed by Court O, and an execution petition was filed in that Court for having a re-valuation made of the improvements and for delivery of the property. Thereafter the place where the mortgaged property was situated was transferred from the jurisdiction of Court O to that of Court P. Court O nevertheless disposed of the execution petition, and, in the course of so doing, it ordered that there should be a re-valuation of the improvements and that a warrant for delivery of the property should be issued. The defendants submitted to the jurisdiction of Court O. so far as it issued directions for revaluing the improvements, and did not object to the jurisdiction of that Court to dispose of the execution petition either in his counter-petition or even at the stage when delivery was ordered. On appeal to the lower appellate Court, an objection was taken for the first time to the jurisdiction of Court O to pass an order for delivery of the property, and was allowed by that Court.

Held, that the objection was one of form only and not of substance, and that, in the circumstances of the case, the Court below ought not to have allowed the objection to be taken for the first time before it.

The Court which passes a decree must in all cases send it for execution to the Court which has territorial jurisdiction over the subject-matter of the suit if between the passing of the decree and the executing of it the jurisdiction has passed to another Court.

Semble : The principle of S. 21, C. P. C. is applicable to execution proceedings.

Appeal against the appellate order of the District Court of South Malabar dated the 21st November, 1921 in A. S. No. 480 of 1921 preferred against the order of the Court of the Subordinate Judge of Ottapalam, dated the 11th April, 1921 in E. P. No. 136 of 1920 in O. S. No. 6 of 1919.

*A. A. A. O. No. 22 of 1922. 28th August, 1923.

Manavikraman v. Ananthanarayana Ayyan.

K. P. M. Menon for appellant.

C. V. Ananthakrishna Aiyar (The Government Pleader) and *P. S. Narayanaswami Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—In O. S. No. 6 of 1919 a decree for redemption of a kanom demise was passed by the Subordinate Judge of Ottapalam on March 5, 1920. An execution petition was filed on August 6, 1920 for having a re-valuation made of the improvements and for delivery of the property. On the 1st October, 1920 the place where the mortgaged property was situated was transferred from the jurisdiction of the Ottapalam Subordinate Judge's Court to that of the Palghat Subordinate Judge's Court. The Subordinate Judge of Ottapalam disposed of the execution petition, and, in the course of so doing, he ordered on the 16th December, 1920 that there should be a re-valuation of the property, and on the 11th April, 1921 he ordered that a warrant for delivery of the property should be issued returnable on the 21st June, 1921, and he adjourned the further hearing of the petition for disposal of other matters referred to therein.

On appeal to the District Judge an objection was taken for the first time to the jurisdiction of the Subordinate Judge of Ottapalam to pass an order for delivery of the property after the executing Court had lost jurisdiction over the locality where the property was situated. This objection was upheld by the District Judge and the lower Court's order was set aside.

It is clear from the above dates that both at the time of passing the decree and at the time when the execution petition was presented the Ottapalam Sub Court had territorial jurisdiction over the subject matter of the suit. It follows therefore that the Ottapalam Court was " the Court which passed the decree " within the definition in S. 37 (*b*), C. P. Code. S. 38 provides that ' a decree may be executed either by the Court which passed it, or by the Court to which it is sent for execution. ' S. 39 (*c*) provides that ' the Court which passed the decree may on the decree-holder's application send it for execution to another Court if the decree directs the sale or delivery of immoveable property situate outside the local limits of the jurisdiction of the Court which passed it. '

As Mukerjee, J. has observed in *Begg Dunlop and Co.* v. *Jagannath Marwari* (1), these provisions read together

1. (1911) 14 C L J 228 at 231.

Manavikraman. v. Ananthanarayana Ayyan.

plainly indicate the general principle that no Court can execute a decree in which the subject matter of the suit or of the application for execution is property situate entirely outside the local limits of its jurisdiction, and he quotes the Full Bench decision of the Calcutta High Court in *prem Chand Dey* v. *Mokheda Debi* (2) in support of this elementary principle. We are not inclined to accept the suggestion that S. 38 makes it optional to a Court to execute its own decree or to transmit it to the Court which has territorial jurisdiction if the original Court has lost jurisdiction over the subject matter of the suit. Although the words in S. 39 are, " the Court may send it for execution " we think that in all cases the Court should send its decree to the Court which has territorial jurisdiction if between the passing of the decree and the executing of it the jurisdiction has passed to another Court. In this view of the case, it is unnecessary to canvass the correctness of the decision of the Full Bench of the Calcutta High Court in *Prem Chand Dey* v. *Mokheda Debi* (2) to the effect that a Court has no jurisdiction in execution of a decree to sell property over which it has no territorial jurisdiction at the time when it passes the order of sale.

In the present case the objection to jurisdiction was not taken in the executing Court but was taken for the first time in the grounds of appeal to the lower appellate Court. The question therefore arises whether the submission by the defendant to the jurisdiction of the Ottapalam Subordinate Judge's Court cures its want of jurisdiction. There can be no doubt that under S. 21 of the Civil Procedure Code such an objection will not be admissible if it is not raised to the trial of a suit by a Court which has no jurisdiction over the place of suing. This section makes it imperative that such objection should be taken in the Court of first instance at the earliest possible opportunity, in any case before issues are settled ; and there must further be a consequent failure of justice for sustaining the objection.

The respondent's pleader has conceded that he submitted to the jurisdiction of the Ottapalam Court so far as it issued directions for re-valuing the improvements, that being a matter which the executing Court has jurisdiction to dispose of under S. 6 of the Malabar Compensation for Tenants Improvements Act. There is nothing in the statement put in by the 1st counter-petitioner at the time of execution or in the B Diary

2. (1890) I L R 17 C 699 (F. B.)

Manavikraman v. Ananthanarayana Ayyan.

to show that he took this objection even at the stage when delivery was ordered.

The question whether S. 21 of the Civil Procedure Code is applicable to execution proceedings was referred to a Full Bench in *Zamindar of Ettiyapuram* v. *Chidambaram Chetti* (3) but was not directly decided. From the order of reference by Seshagiri Aiyar, J. and from the opinion of Sir John Wallis, C. J. it appears that both those learned Judges were inclined to extend the same principle to execution proceedings ; but they decided the case upon other considerations which were that in execution no party had a right to question the correctness of the decree which was being executed or the jurisdiction of the Court which passed it. Following this Full Bench decision, in C. R. P. No. 372 of 1921, one of us applied the same principle to an objection to jurisdiction which was taken only in the executing Court.

We are of opinion that the objection in the present case is one of form only and not of substance. The District Judge's order will only have the effect that the property will have to be delivered to the defendant and then it will be open to the plaintiff to apply to the Palghat Subordinate Court for a fresh order for delivery and all the formalities of issuing a commission and handing over property by means of an amin will have to be repeated without any advantage to any one.

In the circumstances of the case, as the defendant took no objection at the time but submitted to the jurisdiction of the executing Court and only raised this objection after the order had been passed, we think that the District Judge would have been well advised to have refused to allow such an objection to be taken in appeal and that he should have declined to interfere with the executing Court's order upon an objection which was utterly devoid of merits.

In this view, we set aside the District Judge's order and restore the order of the Subordinate Judge with costs here and in the District Court.

A. S. V. *Order set aside.*

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3. (1920) I L R 43 M 675 : 39 M L J 203 (F B).

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Balaguru Naidu by his authorised agent Chidambaram Chetti *Petitioner** (*Petitioner*).

v.

Muthuratnam Aiyar and others *Respondents* (*Counter-petitioners*).

Balaguru-Naidu *v.* Muthu-ratnam Aiyer.

Pauper—Application for leave to sue as —Nature of—Dismissal of petition—validation of plaint by payment of Court-fee within time allowed—Effect—Date of presentation of plaint in such a case.

A pauper application is really a combination of a plaint and an application to excuse the payment of Court-fee on it. When the petition is dismissed on any ground, it is the application that fails. The plaint, however, remains and may be validated by payment of Court-fees within a time to be fixed by Court, if the Court in the exercise of its discretion is prepared to grant time. When time is granted for payment of Court-fee and the same is paid within the time allowed, the plaint must be taken as filed on the date it was originally put into Court along with the pauper petition.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order dated 27th June, 1921 of the Court of the District Munsif of Trichinopoly in O. P. No. 18 of 1920.

C. A. Seshagiri Sastri for petitioner.

T. V. Muthukrishna Aiyar for respondents.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENT :—A pauper application is really a combination of a plaint and an application to excuse the payment of Court-fee on it. When the petition is dismissed whether on the ground that the petitioner is not a pauper or on the ground that a dismissal of a similar previous petition bars the present petition it is the application that fails but the plaint remains and may be validated by payment of Court-fees within a time to be fixed by Court if the Court in the exercise of its discretion is prepared to grant time. The District Munsif is not right in thinking that there should be a competent application to sue in *forma pauperis* on record before time can be given to pay Court-fees on the plaint filed at the same time. No case has laid that down. The case will therefore go back to the District Munsif to decide whether he considers there is proper ground to grant plaintiff time to pay the Court-fees till the date when he actually paid it and if he holds in favour of

*C. R. P. No. 804 of 1921. 11th April 1923.

Balaguru-Naidu *v.* Muthu-ratnam Iyer.

the plaintiff on the point, the plaint will have to be taken as filed on the date it was originally put into Court along with pauper petition. See *Stuart Skinner* alias *Nawab Mira* v. *William Orde*(1). The suestion is one for the exercise of the Munsif's discretion on the facts of the case.

The order of the lower Court is set aside and the case remanded to it for a fresh disposal on the light of the above.

Costs of this Civil Revision Petition and of the proceedings in the lower Court will abide and follow the result.

A. V. S. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE RAMESAM.

K. V. Periya Miyana Marakayar and Sons, composed of and others — *Appellants** (*Defendants*).

v.

P. K. Subramania Aiyar and others. — *Respondents* (*Plaintiffs*).

Peria Maiyana marakayar *v.* Subramania Iyer.

C. P. Code—O. 37, R. 3—Leave to defend—Grant of—Discretion of Court—Principles—Payment into Court or furnishing security—Condition as to—Order imposing —When proper.

The question to be considered on application under O. 37, R. 3 C. P. C. is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. The defendant must state what his defence is, and must, as a rule, bring something more before the Court to show that it is a *bona fide* defence, and not a mere attempt to gain time by getting leave to defend. Once the Court comes to the conclusion that there is a triable issue in the case, it must grant leave to defend without requiring the defendant either to pay the amount claimed into Court or to furnish security therefor. Such a condition must be imposed only in exceptional cases, where, for instance, there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time.

On appeal from the order dated 28th August, 1923 of the Hon'ble Mr. Justice Kumaraswami Sastri passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 204 of 1923.

V V Srinivasa Aiyangar and *A. Narasimhachariar* for appellants.

N. Chandrasekhara Aiyar for respondents.

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*O. S. Appeal No. 79 of 1923. 5th November 1923.

Peria Malyana Marakayar v. Subramania Iyer.

Sir Walter Schwabe. C. J.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal from an order made by Kumaraswami Sastri, J. under O. 37 of the Civil Procedure Code, the suit being a suit on hundis given by the defendants to the plaintiffs or their predecessors. Long affidavits were put in on both sides, and a large body of correspondence, by no means complete, is exhibited to those affidavits.

The question to be considered on applications under O. 37, R. 3 is whether or not a triable issue is disclosed on affidavit or otherwise by the defendant. By triable issue is meant a plea which is at least plausible. It is not enough for instance, to say, " I have got a good defence but the defendant must say what the defence is, and, as a rule, bring something before the Court to show that it is a *bona fide* defence and not a mere attempt to gain time by getting leave to defend. There is not a great difference between those cases where it is right to give judgment and those where it is right to give leave to defend on paying the amount into Court or on giving security ; but there are cases in which the defendant sets up some sort of defence, which does not bear the stamp of truth, as for instance, when it is contradicted by documents, when the Court may well say that he should only be allowed to come and put that defence before the Court, if he is prepared to give security for the amount claimed. I think the principle applicable here has been laid down clearly in similar applications under O. 14, R. 1 of the Rules of the Supreme Court in England by the House of Lords in *Jacobs* v. *Booths Distillery Co.* (1), *Codd* v. *Delap* (2) and *Jones* v. *Stone* (3).

In this case I do not think that the learned Judge turned his mind to the consideration of the question whether or not there is a triable issue in this case. He seems to have taken the view that here are hundis on the face of which *prima facie* the defendants would be liable, and therefore they must as a condition of leave to defend pay the money into Court or give security. We have before us the same materials as he had, and on a study of the correspondence, which in these matters is always the most important thing to look at, explained as it is by affidavits on both sides, it seems to me that the relationship between the parties had been so complicated, that there

1. 5 L T 262. 2. 92 L T 510. 3. (1894) A. C. 122.

may well have been transactions, which are referred to in certain of the letters, in which the plaintiff's predecessor and the defendants were signing bills and hundis for each other's accommodation. There is an absence of books on the part of the plaintiffs. There is on the other hand a statement on oath that the defendant's books, which of course could have been made available by the plaintiffs if they had so chosen show that the amounts sued for in this suit were not, as between the plaintiffs and the defendants, due from the defendants to the plaintiffs. I think it is quite impossible on the facts of this case to say that there is not a triable issue. We express no sort of view as to whether the defence is good or bad : that will be a matter for the trial Judge. But having come to the conclusion that there is a triable issue in this case, it will not be right to say that, as condition of being heard at all, these defendants should find money or security, because, if they are not able to do so it will be depriving them altogether of a right that they have got of having their case tried. It is only in exceptional cases that the exceptional provisions of O. 37 come into operation to the extent of depriving a man of this right. In cases of this sort the Court has to find if there is any plausible defence, and where there is one, effect must be given to that fact and leave to defend should be granted, and it should be made conditional only in cases, where there appears to be so grave a suspicion that the Court comes to the conclusion that the defence is put in only in order to obtain further time.

In these circumstances this appeal must be allowed and leave to defend the suit must be granted. I think the proper order in this case is that the costs of the original application and of this appeal shall be costs in the cause. Written statement in 14 days.

Ramesam, J. :—I agree. Ramesam, J.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice,* MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE RAMESAM.

Venkatrama Aiyar *Appellant**,

v.

A. V Rangiyan Chetty and another *Respondents.*

Venkatrama Aiyar *v.* Rangiyan Chetty

Mortgage—Prior and puisne mortgagee—Decree on mortgage—Subsequent suit for maintenance and declaration of charge—Decree subject to rights of prior mortgagee--Sale in execution of mortgage decree--Rights of purchaser-Lis pendens.

Where a first mortgagee sues on his mortgage without making the second mortgagee a party, brings the property to sale and purchases it in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party.

Mulla Veetil Seethi v. *Achutan Nair* (1910) 21 M L J 213 (F B) ref. to.

But this rule cannot apply where the so-called second mortgage did not exist either at the time suit or decree or even at the time of the sale in execution of the decree on the first mortgage.

The doctrine of *lis pendens* affects private alienations as well as execution sales of property in respect of which a charge is claimed in a suit for maintenance by a Hindu widow.

Kunni Umah v. *Amed* (1890) 14 M 491 ; *Dose Thimmanna Bhatta* v. *Krishna Tantri* (1906) 29 M 508 16 M L J 413 relied on.

The respondent's predecessor in title obtained a decree for sale on a mortgage. Subsequently a Hindu widow sued for her maintenance and claimed a charge on the properties mortgaged, impleading the mortgage-decree holder as a party. A decree was passed for maintenance which was made a charge on the interests of the mortgagor in the properties, subject to the lien claimed by the mortgage-decree holder. Pending the suit for maintenance the mortgage-decree holder brought the properties to sale in execution and purchased them himself. The properties were then conveyed to the respondent. Later on, in execution of the decree for maintenance the properties were sold and purchased by the appellant. On a question arising as to the rights of the parties with reference to the properties sold in execution, *held* that the respondent had acquired a valid title to the properties.

Appeal under cl. 15 of the Letters Patent against the order and judgment of the High Court in C. M. A. No. 11 of 1921 preferred against the order of the District Court of Trichinopoly, dated 25th November, 1920 in E. A. No. 498 of 1920 in O. S. No. 1 of 1889.

K. V Krishnaswami Aiyar and *N. Swaminatha Aiyar* for appellant in L. P. A. No. 10 of 1922.

K. R. Rangaswami Aiyangar for respondents in L. P. A. No. 10 of 1922.

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*L P A Nos. 10, 11 and 12 of 1922. 25th October, 1923.

The Judgment of the Court was delivered by

T. V Muthukrishna Aiyar for respondents in L. P. A. No. 11 of 1922.

C. V Ananthakrishna Aiyar for respondents in L. P. A. No. 12 of 1922.

Ramesam, J. :—On 6—10—88, a suit (O. S. No. 1 of 1889) was filed by a Hindu widow for maintenance. As to one of the defendants (14th) impleaded in that suit, she alleged that he held a mortgage over a portion of the property sought to be charged with the maintenance and that the said mortgage was obtained fraudulently and without consideration, was not for family benefit and could not affect her right to charge the maintenance on the mortgaged property. The 14th defendant pleaded that he held two hypothecation bonds from the 1st defendant and that he had sued on the latter in O. S. No. 16 of 1887, and obtained a decree (on 28—9—87).

The District Judge found that the plaintiff had no cause of action against the 14th defendant. He gave a decree for maintenance which was made a charge against the *interests of defendants* 1 *and* 2 *in the plaint properties* subject to the lien claimed by the 14th defendant among others. (22—8—90).

Meanwhile in execution of O. S. No. 16 of 1887 the mortgaged property was sold on 28—11—1889 and the decree-holder purchased it and obtained delivery on 25—12—1889. The respondents before us are his assignees.

In execution of the maintenance decree the same property was sold on 10—3—1920 and the purchaser obtained delivery on 19—7—1920. He is the appellant before us. Objection was made by the respondents to the delivery and the matter came up to this Court under S. 47, C. P. Code in C. M. A. No. 11 of 1921. The two learned Judges who heard it having differed, the appeal was dismissed under S. 98, C. P. C. Hence this Letters Patent Appeal.

The appellant, while conceding that his purchase was subject to the mortgage of the 14th defendant in O. S. No. 1 of 89, claims that he can ignore the sale in execution of O. S. No. 16 of 87 and contends that his purchase is valid subject to the mortgage which he is entitled to redeem. This contention is raised in two forms :—

That the decree holder in O. S. No. 1 of 1899 was in the position of a second mortgagee and that first mortgagee not having impleaded her in the sale proceedings of

Venkatrama Aiyar *v.* Rangiyan Chetty.

O. S. No. 16 of 1887, he is still liable to be redeemed by the second mortgagee or by the appellant who is subrogated to the second mortgagee's rights. It is true that, when a first mortgagee sues on his mortgage without making the second mortgagee a party, brings the property to sale and purchases it in execution, the right of the second mortgagee to redeem the first mortgage is not extinguished by the proceedings in such a suit to which he was not a party. *Mulla Veettil Seethi* v. *Achuthan Nair* (1). But the principle cannot apply in this case as the so-called second mortgage did not exist either at the time of the suit or decree (O. S. No. 16 of 1887) or even at the time of the sale in execution of the decree. The charge granted by the maintenance decree in O. S. No. 1 of 1889 came into existence only at the date of the decree and not earlier. The charge can be made use of as if it existed at the date of the plaint only by the principle of *lis pendens*. This leads to the next contention.

By the doctrine of *lis pendens*, the 14th defendant in O. S. No. 1 of 89 was prohibited from dealing with the property [or selling it in execution, *Kunhi Umah* v. *Amed* (2)] which was the subject of the maintenance suit [*Dose Thimmanna Bhutta* v. *Krishna Tantri* (3)], so as to affect the rights of the plaintiff under the decree therein. The appellant contends that the sale in execution of O. S. No. 16 of 1887, if upheld, will so affect the plaintiff's rights under the decree in O. S. No. 1 of 1889. This contention cannot be accepted. In O. S. No. 1 of 1889 it was held that the plaintiff had no cause of action against the 14th defendant, that his mortgage was perfectly valid and the charge given to the plaintiff was subjected to his rights. The decree used the word ' lien ' but as the judgment made no distinction between the mortgage and the decree (which was also known to the Court) obviously all the rights of the 14th defendant under his decree were intended to be saved. This is the natural and proper construction of the decree in the light of the findings in the judgment and the pleadings. That being so, it cannot be said that the sale in execution of O. S. No. 16 of 1887 affects the rights of the plaintiff in O. S. No. 1 of 1889 under the decree which saved the rights of the decree-holder in O. S. No. 16 of 1887. The consideration that the effect of this conclusion is to make the lien obtain-

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1. (1910) 21 M L J 213 (F B). 2. (1890) I L R 14 M 491.
3. (1906) I L R 29 M 508 : 16 M L J 413.

ed by the decree-holder in O. S. No. 1 of 89 illusory so far as the property mortgaged to 14th defendant was concerned, cannot affect the construction of the decree which *expressly* saved the rights of the 14th defendant and cannot, by *implication*, adversely affect such rights simply because it purported to give a charge to the plaintiff on the interests of defendants 1 and 2 which had ceased to exist.

The appeal is dismissed with costs.

Letters Patent Appeals Nos. 11 and 12 follow and are dismissed. In L. P. A. No. 12 with costs.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

[FULL BENCH.]

PRESENT :—SIR WALTER SALIS SCHWABE K. C. *Chief Justice*, MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE RAMESAM.

Tirumalai Gandama Kondala Nagayya Ramakrishna Kadirvelusami Nayakar (minor) by his mother and guardian Velythaiammal, through her authorised Agent Mecca Meera Levvai Rowther *Appellant in both (Petitioner-6th Defendant).*

v.

The Eastern Development Corporation, Limited, London by its authorised agent Mr. Partridge, Solicitor *Respondents in both (Respondents-Assignee-Decree-holder).*

F. B.

Kadirvelusami Nayakar *v.* The Eastern Development Corporation, Ltd.

C. P. Code—S. 52—Property of deceased—Income of accrued since death of deceased and come into hands of representative if included in —Attachment of income —Decree-holder's right of —Realisation of amount attached —Procedure—Full Bench—Reference of case to—Propriety—Conditions.

Under S. 52 of the Code the income of landed property which has passed from one Zamindar to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zamindar.

Income accrued since the late Zamindar's death, which has come into the hands of the new Zamindar can be attached. It is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another.

Where a case was referred to a Full Bench because "It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined," *held* that the reference was one which ought not to have been made.

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*C M A Nos. 85 and 86 of 1921. 24th October, 1923.

F. B

Kadirvelusami Nayakar v. The Eastern Development Corporation, Ltd.

Appeals against the order of the District Court of Madura in E. A. Nos. 274 and 619 of 1919 in E. P. No. 5 of 1918 and E. P. No. 4 of 1915 respectively in O. S. No. 65 of 1897 on the file of the Court of the Subordinate Judge of Tinnevelly.

The Appeals came on for hearing on 8th January, 1922 and on 26th and 27th March, 1923 and 18th April, 1923.

K. V Sesha Aiyangar for the appellant.

A. Krishnaswami Ayyar and *C. A. Seshagiri Sastri* for the respondent.

The Court (Oldfield and Venkatasubba Rao, JJ.) made the following

ORDER OF REFERENCE TO THE FULL BENCH :—

Oldfield, J.

Oldfield, J. :—The essential facts in these appeals lie in a small compass. The decree in O. S. No. 65 of 1897 on the file of the Subordinate Court, Tinnevelly, was for the recovery of the amount due on a simple mortgage by sale of the impartible zamindari of Gantamanayakkanur. The Zamindar, against whom the decree was passed, died and was succeeded by his son 6th defendant, the present appellant, in 1908, before any of the proceedings to be referred to. They began with an abortive attempt to recover by sale and the appointment of a Receiver to collect the profits and credit them against the decree. The respondent Company then became solely entitled to execute it and at a sale, confirmed on 8th September, 1914, purchased the zamindari, taking delivery in January 1915, and the Receiver was then discharged. On 25th March, 1915, a personal decree for the balance still due was passed by the lower Court against 6th defendant. That decree was set aside, as passed without jurisdiction. But previously on 24th April, 1915 another Receiver had been appointed to collect certain rents and profits outstanding for the years 1910—1913, after appellant became Zamindar, but before the sale, and it is the right to the amount collected by him, which is now in dispute. After the personal decree was set aside by this Court, another personal decree was obtained in the Subordinate Court, Tinnevelly, and was transferred to the lower Court for execution by recovery of the balance due from this fund. Appellant in E. A. No. 619 of 1917 asks for restitution of a portion of it, which was paid out to respondent, under the first personal decree, since set aside, and in E. A. No. 274 of 1919, he claims the balance still with the Receiver against the respondent's

attachment. The lower Court in the orders under appeal dismissed these applications.

In the lower Court the claim was also to certain properties said to have been bought in by the Receiver at Court sales in the course of his recovery of the rents. But here it is not disputed that these purchases were made by him, not as Receiver, but in the capacity, which he also held, of Manager of the zamindari under the respondent Company ; and therefore nothing more need be said of that part of the claim. The claim to the fund is the sole matter now in dispute ; and it has been argued, it is material, only with reference to the question whether the fund should be regarded as liable in the hands of respondent, for the deceased Zamindar's judgment-debt and the personal decree obtained against respondent as his legal representative, no objection having been made to the assumption that the realizations by the Receiver were made on 6th defendant's behalf, as though he had received them directly.

The provisions of law in question are Ss. 52 and 53 of the Civil Procedure Code, the former being relevant in case appellant claims the zamindari and therefore the fund, which accrued from it, by survivorship and it is to be deemed to be property liable in his hands under Hindu Law for the payment of the debt of his deceased father ; the latter in case he claims it by heirship. The point is that, if respondent can proceed in execution against the fund at all, a question to which I return, different objections to his doing so are relied on according to the nature of appellant's right to the estate. For it is urged that, if he took the estate by survivorship, the fund, its income, nevertheless reached his hands as his absolute property and was not subsequently merged by him in it by any course of dealing ; and it therefore is not liable as part of his share of joint property for his father's debt. If, on the other hand, the estate was his inheritance and was liable for the last owner's debt in his hands, the question raised is whether its subsequent income would not also be so, as an accretion to it. Before dealing with these questions I observe that no issue was joined and no evidence was given in the lower Court as to the nature of his succession ; and no suggestion was made and no finding was recorded as to any conduct by him indicative of an intention to merge these profits, which in the first instance were certainly separate property, in the zamindari and, if the zamindari was family property, to impress them with that character. On

Kadirvelusami Nayakar v. The Eastern Development Corporation, Ltd.

Oldfield, J.

the latter point the only possible conclusion is no doubt in the negative. For he never obtained the profits, which were with the Receiver from their realization, and had no opportunity of treating them as possessing one character rather than the other. The former also is not material. For, if the zamindari is ancestral or family property, I still hold that the fact is relevant only for the purpose of determining the person entitled to succeed to it, not the nature of his rights in it on succession, which will in any case be a right to it as separate property with the full power of enjoyment and alienation, which has been recognized fully by authority. It will serve no useful purpose to state my reasons for this conclusion at any length, since I can add nothing to the enumeration of authorities at the date of decision of the Privy Council in *Baijnath Prasad Singh* v. *Tej Bali Singh* (1), in Mayne's Hindu Law and Usage, 9th Edition, 796, except that this decision seems to me in no degree to entail the conclusion reached in *Raja Shri Shiva Prasad* v. *Banmohan* (2), or to displace that reached by this High Court in *Rajah of Kalahasti* v. *Achigadu* (3), *Zamindar of Karvetnagar* v. *Trustee of Tirumalai, Tirupati, etc., Devasthanams* (4), *Maharaja of Bobbili* v. *Zamindar of Chundi* (5) and *Avalappa Naicker* v. *Murugappa Chettiar* (6).

On the basis, however, that the zamindari is separate property inherited by Appellant and that therefore only S. 52 need be considered, two questions of some difficulty and importance have been raised, which should, we think, be laid before a Full Bench. The first is whether in such a case not only the inherited property is liable for the debts of its deceased owner but also the profits, such as the fund at present in dispute, which have accrued from it after his death ; and the second, whether clause 1 of S. 52 authorizes execution against a deceased's property in the hands of his legal representative in this extended sense and by any method other than that actually specified in it, attachment and sale. The first question is one of substantive right, the second one of procedure and construction, its importance being that, if it must be answered in the negative and if respondent's attachment cannot, in consequence of the nature of the property be followed by a sale, that attachment was not

1. (1921) I L R 43 A 228. 2. (1921) I L R 1 Pat 387.
3. (1907) I L R 30 M 454 : 17 M L J 367.
4. (1909) I L R 32 M 429 19 M L J 401.
5. (1911) I L R 35 M 108 21 M L J 593.
6. (1912) I L R 36 M 325 23 M L J 658.

F B.

Kadirvelusami Nayakar
v.
The Eastern Development Corporation, Ltd.

Oldfield, J.

authorized by the section and can be no obstacle to Appellant's claim.

On the first of these questions there is no doubt the clear principle that the deceased's assets are liable for his debts. But it is argued on behalf of Appellant that the assets include only what is available during deceased's life-time and can be described as accruing to him, not what may become realizable only after his death. On the other hand, the contrary is argued in accordance with general principle as supported by English authority and with the Statute Law of India regulating the distribution of estates by executors or administrators. As regards the former, it seems clear that in England goods which have accrued by increase since the death of a testator are assets, this having been so always in respect of personal property, *vide* Williams on Executors, 11th Edition, 1272 ; and, although real property became assets only in consequence of a course of legislation ending with the Land Transfer Act (60 and 61 Victoria, Ch. 65), there has never been any doubt that so far as it is assets, its profits also are liable as assets, because they are accretions to it. *In re Hyatt* (7) explained in *In re Moore* (8). In India the Succession Act (X of 1865) and the Probate and Administration Act (V of 1881) no doubt contain no general provision as to accretions, but they are dealt with in connection with specific legacies and in connection with the residue in sections 309 and 310 of the former and 128 and 129 of the latter and under other sections of both Acts they are liable subject to the other rules laid down for the distribution of the estate equally with property, with which they are connected. It is true that there is nothing in the latter Act regarding accretions to the estate of an intestate Hindu and their liability in the hands of an administrator for his debts. But it may fairly be contended that their liability will be the same, whether there is or is not a will and further whether or no the estate is distributed by an administrator appointed by the Court. This reference to the Statute Law, which is not directly applicable to the fund in dispute, is of course relevant only as indicating that the English Law as to accretions has been adopted in India ; but even such an indication is important, when very little authority regarding them and their liability for debts has been adduced. For only two decisions, which are really in point have been cited, and in one

7. 38 Ch. D. 609. 8. (1907) I. R 2 Ch. 304.

F. B.
Kadirvelusami Nayakar
v.
The Eastern Development Corporation, Ltd.
Oldfield. J.

Azeemunnisa v. *Ameer Unnisa Khatoon* (9) the liability is maintained but without any discussion. So also it was negatived in *Rani Kunno Dai* v. *B. J. Lacy* (10), the portion of the judgment at present material being, however, *obiter*, since the right to execute against accretions was then negatived also by an agreement with the heir. In *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu* (11), however, the creditor's right to proceed against accretions was recognised on full consideration, the case last mentioned being distinguished and *In re Hyatt* (7) being referred to. There is certainly very little authority on a question which, it might be supposed, would have been raised and decided in all the Presidencies. But we have been shown no reason for refusing to follow the decision of this Court just cited, and I should have been prepared to decide in accordance with English Law and the rule to be deduced from Indian Statutes that accretions are liable, if it were not advisable to leave the matter open for determination in connection with the further question now to be stated.

On the assumption that the conclusion just suggested is correct, we have next the facts that S. 51 of the Civil Procedure Code in terms authorises execution only by attachment and sale and that this method of execution is not applicable to a fund, such as that now in dispute. Execution by attachment and sale is applicable only to the descriptions of property, to which that method of execution is applied in O. XXI and this fund is not one of them since other methods of realization are provided, when money in the hands of a third person is concerned. No doubt a debt due to the judgment-debtor may be attached and sold under O. 21, Rr. 46 (1) (*a*) and 79 (3). But, although the fund in the hands of the Receiver may be payable to the appellant or to respondent, if he can claim it in any other way, for instance in administration proceedings, it is not a debt due to the former for money had and received or otherwise, when it reached and is being retained by the Receiver (in spite of the invalidityof his appointment) in consequence of and subject to the orders of the Court and on its behalf. The case in fact is covered, as regards attachment by R. 52 and as regards further proceedings by the reference to the further orders of the executing Court therein ; and if the reference to attachment and sale in S. 52 is to be read literally, the respondent's claim based on the application of that section must be rejected.

9. 15 W R 285.
10. I L R 19 A 235. 11. (1916) 30 M L J 391. 7. 38 Ch. D. 609.

F. B.

Kadirvelusami Nayakar *v.* The Eastern Development Corporation, Ltd.

Oldfield, J.

This, it may be observed, refers directly to the portion of the fund, which is still with the Receiver. As regards the portion already paid to respondent, restitution of which is asked for in E. A. No. 619 of 1917, it may be pointed out that it was in fact paid out on the order of the Court and without execution by sale.

The question is then whether the limitation to attachment and sale of the methods of execution open to decree-holders, such as respondents, which a strict construction of S. 52 entails, should be sustained. It is true that a reason for such limitation is difficult to conjecture, particularly in view of the general reference to execution without specification of any method in S. 50 dealing with decrees obtained against the deceased himself and only to be enforced against his representatives. Against this, however, it may be suggested that the intention of the legislature was to restrict execution against the deceased's property to cases in which liability is clear and identifiable, moveable or immoveable items of it are available for sale, insisting in accordance with some principle corresponding with that of the Administration of Estates Act (3 and 4, William IV, Ch. 104) on the creditor obtaining an administration judgment in others. *Vide In re Moore* (8) already referred to. That Act, it may be pointed out, did not deal with claims such as those covered by S. 50, which had not become merged in a judgment before the testator's death and which were left to be recovered in India, as they were recoverable in England, by ordinary execution, *vide* Williams on Executors, 11th Edition I, 778. And the use in the Code of the expression "property" instead of "assets of the deceased" may be consistent with this view; for the latter term has been in use in India since the Succession Act of 1865 and it is possible that the former replacing the term "estate" in the Code of 1882, may have been deliberately preferred in order to avoid the implications, which a reference to "assets" would have entailed.

All these, however, is conjectural; and the actual wording of the section is the firmer ground for a conclusion. Respondent contends that a free construction is made necessary by the inconvnience, if not the absurdity, of the result of adherence to the wording as it stands and that for "attachment and sale" we should read "attachment or attachment and sale" or else that the sentence should run simply "it may be executed against

8. (1907) L R 2 Ch. 304.

F. B.
Kadirvelu-sami Nayakar v. The Eastern Development Corporation, Ltd.
Oldfield, J.

any such property, the words "attachment and sale" being merely a generic reference to execution procedure other than that relating to arrest. But it may be doubted whether the inconvenience or absurdity involved by a literal construction is great enough to justify these violent suggestions. As regards the first, more would still be required in the present and other cases, since attachment alone would not be sufficient to give the decree-holder his remedy and a reference to his obtaining the further orders of the Court would be required, *vide* O. XX, Rr. 52 and 53; and provision for equitable execution by the appointment of a Receiver under O. 40, R. 1, would still be wanting. As regards the second, it is true that the enumeration in S. 51 of methods of execution specifies, apart from the residuary item (e) and the appointment of a Receiver as item (*d*), only attachment and sale, item (*b*), as an available method of recovering under a money decree from the property of the judgment-debtor. But, if S. 51 is read in the light of O. XXI, it cannot be regarded as exhaustive and, as it was first enacted in any form in the present Code, it cannot control the interpretation of S. 52, which is almost identical with S. 252 of the Code previously in force. Neither suggestion is in any degree probabilized by the context and the improbability that the legislature through oversight excluded the remedy appropriate in certain cases is really all that Respondent can rely on.

As observed already in connection with another portion of the case, there is very little authority regarding the liability of a fund such as that now in dispute and there is not likely to be more regarding the way, in which that liability can be enforced. In *Rajah of Kalahasti* v. *Sree Mahant Prayag Dossjee Varu* (11) already referred to, the latter question did not arise, as execution was being taken against the legal representative's own property under S. 52 (2) ; and no decision dealing with that question in connection with other descriptions of property for which sale is not the appropriate method of execution, has been shown us. My learned brother is, I understand, more inclined than I am to a construction of S. 52, such as respondent contends for ; and it is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined. We therefore refer for the decision of a Full Bench the questions above stated.

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11. (1916) 30 M L J 391.

F. B.

Kadirvelusami Nayakar v. The Eastern Development Corporation, Ltd.

Venkatasubba Rao, J.

Venkatasubba Rao, J. :—As my learned brother has very fully dealt with the questions raised, I shall in a few words state what my own view on the point is. Subsequent to the passing of the decree against the Zamindar he died and was succeeded by his son, the appellant before us. The respondent Company, assignee-decree-holder, executed the decree and purchased the zamindari at a sale confirmed on 8—9—1914 and took delivery thereof in January 1915. On 23—3—1915 a personal decree for the balance due was passed against the appellant, and on 24—4—1915 a Receiver was appointed to collect rents and profits outstanding for the faslis 1321 to 1323 (1911 to 1913), that is, for the period between the death of the previous Zamindar and the sale referred to above. The personal decree was however, set aside on 5—3—1917 as passed without jurisdiction and another personal decree was obtained on 24—9—1917. The following items of property were attached on 6—3—1918 :—" (1) Amounts due under decrees in rent suits obtained by the Receiver, (2) arrears of rent due to the judgment-debtor for faslis 1321 to 1323." The learned District Judge observes : " The real dispute relates to the outstandings of the estate in the shape of rents and mesne profits for faslis 1321 and 1323, whether decreed or not and whether realized or not." The Lower Court upheld the right of the respondent to the items attached.

The questions were argued before us, one relating to mere procedure and the other to substantive rights of the parties.

Dealing first with the question of procedure raised, I find it difficult to understand how on the facts stated by the District Judge the points urged by the learned vakil for the appellant arises at all. His contention is this under S. 52 of the Civil Procedure Code when a decree is passed against a party as the legal representative of a deceased person and the decree is for the payment of money out of the property of the deceased the decree may be executed by the attachment and sale of any such property. The personal decree in execution of which the Receiver was appointed having been subsequently set aside, the appointment of the Receiver was void and any amounts realized by him or decrees obtained by him should be regarded as moneys in his hands or decrees obtained by him not in his character of Receiver but as an utter stranger. But I do not find it stated that the Receiver was in possession of any moneys at all. But whatever the true facts may be, the assumption underlying the argument is that under

F. B.

Kadirvelusami Nayakar v. The Eastern Development Corporation, Ltd.

Venkatasubba Rao, J.

S. 52, there cannot be an attachment of property unless the property can be sold in execution. Turning to the words of the section the argument is put in this way: "The decree may be executed by the attachment and sale of the property." If the property against which execution is taken out happens to be property which cannot under the code be sold subsequent to the attachment, the attachment cannot be effected at all. I assume that there is such property in the hands of the Receiver. For instance, if he had cash or currency notes, the property may be attached but it cannot be sold. In that event, is there immunity in the case of cash or currency notes on the mere ground that when attached there cannot be a sale under the provisions of the Code ? O. 21, R. 56 provides that when the property attached is coin or currency notes the Court may direct that such coin or notes be paid over to the decree-holder. Thus the plaintiff obtains satisfaction of the decree without having to sell the property attached. To take another similar instance, under O. 21, R. 53 when the property attached is a decree the creditor who has attached the decree may proved to execute the attached decree and the net proceeds may be applied in satisfaction of the decree sought to be executed. If the argument of the appellant is correct, if a debtor dies leaving assets in the shape of decrees obtained by him or ready cash, they will not be available to his creditors for the mere reason that the assets left happen to be in that shape. One would expect that if a debtor died leaving cash and there was no question of the cash having been secreted or otherwise disposed of, the creditor would be most easily enabled to obtain satisfaction of his debt. There would be no need to go through the lengthy execution proceedings which should be had if the assets left happened to consist, say, of immoveable property. But the contention curiously is that in that very event the creditor is without a remedy. What are the further implications of this position ? If a decree is passed against a legal representative of a deceased person the decree-holder can never ask for appointment of a Receiver in execution. S. 51 clearly lays down that one of the methods of executing a decree is by appointing a Receiver. O. 40, R. 1 enacts that the Court may appoint a Receiver of any property whether before or after decree. If a decree is obtained against a debtor in his lifetime, a Receiver may be appointed in execution to realize the debts due to the debtor ; but if a decree is obtained after his death against his legal representa-

tive, such a course is not open to the decree-holder ; and that is the argument, and I need hardly say that this leads to an absurdity. O. 21, R. 46 provides that in case of a debt not secured by a negotiable instrument, the attachment shall be made by a written order prohibiting the creditor from recovering the debt and the debtor from making payments thereof and that a debtor so prohibited may pay the amount of his debt into Court and that such payment shall discharge him effectually. If the contention of the appellant is correct, the debt attached must be sold and the debtor cannot pay the amount into Court. Even if the debtor offers to pay the amount into Court, it is beyond the power of the Court to receive it, but the debt must be sold. I cannot believe that the legislature intended that such absurd consequences should ensue.

In my opinion the words " attachment and sale, " in S. 52 must not be literally construed, as a too literal interpretation leads to inconvenience and absurdity. S. 50 refers to execution of the decree where judgment-debtor dies after the decree but before the decree is satisfied. S. 52 contemplates proceedings in execution when the decree is passed against the legal representative himself. The object of the two sections seems to be to enact that the property of the deceased debtor shall alone be liable. S. 51 provides various methods of execution and when any of those methods is appropriate, it is not the scope of S. 52 to exclude that particular method. The words used are inapt but the construction which I am inclined to adopt seems to be the only reasonable construction.

Next dealing with the construction of substantive rights raised, my learned brother has dealt with it at considerable length and it will serve no useful purpose to once again discuss the various English authorities that were cited before us. The result of the authorities appears to be that in England the income is treated as assets for the purpose of payment of debts. Is there any reason for refusing to give effect to this rule in India ? I see none. I shall first take the case of a man dying leaving property which his successor inherits. Why should the successor in such a case be treated differently in India and be held not to be under an obligation to pay the deceased's debts out of the income of the property in his hands? The heir or successor may, if he chooses, sell the property immediately after the debtor's death. In that event he gets no income whatsoever from the property. Or the heir may

F. B.

Kadirvelu sami Nayakar v. The Eastern Development Corporation, Ltd.

Venkatasubba Rao, J.

derive income from the property and pay debts from and out of the income. If the income so derived is sufficient for the payment in full of the debts, the corpus remains in the hands of the heir and it will remain at his absolute disposal. But if the heir chooses to derive an income and the corpus itself is not sufficient to pay the debts, I fail to see why the income should not be available to the creditors. That is to say, there is no reason why a succesor who postpones the sale of the corpus or defers the payment of the debts should be in a better position than one who the moment after the deceased's death disposes of the property or discharges the debts. In the case of a son liable to pay out of joint family property his father's debts there is even greater reason to apply the rule. The son is liable under the Hindu Law to pay the debts not only out of his father's share of the property but also out of his own share. How then can he be heard to say that the income from the property is not liable ?

Turning to the case of an impartible estate, I find that it is difficult to distinguish it for this purpose from the case of an ordinary partible estate. Whether in the hands of the father it was self-acquired property or joint family property and whatever the rule of succession applicable may be, I cannot imagine how the case of an impartible estate can be put on a different footing for this purpose from any other kind of property. The argument that accretions are the absolute property of the successor does not in the least touch the question. They may be the son's absolute property in one sense. But they are not necessarily his absolute property in the sense that they are not available to the father's creditors to the extent they are required for the discharge of his father's debts.

In the result, I agree in the Order of Reference proposed by my learned brother.

The appeal came on for hearing before a Full Bench as constituted above.

K. V. Sesha Aiyangar for appellant.

A. Krishnaswami Aiyar and *C. A. Seshagiri Sastri* for respondents.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—This reference ought not to have been made to this Bench. The two Judges who heard the matter were agreed, and I see no reason for adding

F. B.

Kadirvelusami Nayakar
The Eastern Development Corporation, Ltd.

Sir Walter Schwabe, C. J.

anything to their statements on the points on which they were agreed.

The first point is quite a simple one, whether, under section 52 of the Civil Procedure Code, the income of landed property which has passed from one Zamindar to the next, the property being an impartible Raj, is liable to execution for the debts of the deceased Zamindar, that is to say, in this case, the father of the appellant. *Oolagappa Chetti* v. *Arbuthnot* (1) is a direct authority for the proposition that the income of such property is liable. The English law is perfectly plain, and to the same effect, as laid down in a long series of cases relating to the income from realty which has descended to the heir-at-law. *Stratford* v. *Ritson* (2) is a good instance, in which it was held that the income of such real property is liable for the debts of the deceased as his assets in the hands of his heir, though it is not to be taken until the *corpus* is exhausted.

There is a further point raised by the reference as to whether the money, income accrued since the late Zamindar's death, which has come into the hands of the new Zamindar can be attached and sold. It can be attached, and it is unnecessary to sell it. The Code has made ample provision for execution upon the money belonging to a deceased person in the hands of another. There was no necessity to refer that point, nor do I think it necessary to say anything about it.

The appeals are dismissed with costs.

Coutts Trotter, J.

Coutts Trotter, J. :—I think that this case is covered by the decision in 1 I. A. 268 and I venture to put in my respectful protest against the reasoning on which this case was referred to this Bench. My brother Oldfield says :—" It is advisable that the rights of decree-holders against the property of a deceased person in the hands of his legal representative should be clearly defined." Personally I protest against a Bench being called upon to define generally the rights of decree-holders and I entirely decline to do so. It is enough to say that this case is covered by 1 I. A. 268 and this appeal should be dismissed with costs.

Ramesam, J.

Ramesam, J :—I agree.

A. S. V. *Appeals dismissed.*

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1. (1875) L R 1 I A 268.
2. 10 Beav. 25.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Nataraja Pillai — *Petitioner** (*Petitioner*)

v.

Rengasami Pillai and others — *Respondents* (*Counter-Petitioners.*)

Nataraja Pillai *v.* Rangasami Pillai.

Criminal Procedure Code of 1898—S. 195 (6)—Jurisdiction under —Nature of, appellate, revisional, or special—Sanction to prosecute —Order revoking—Application to High Court under S. 195 (6) to set aside—Maintainability after new Code (Act XVIII of 1923).

The petition was, under S. 195 (6) of the old Code of Criminal Procedure, to set aside an order of a District Magistrate revoking the sanction granted by a sub-Divisional Magistrate, for the prosecution of the respondents for an offence under S. 188 I. P. C. Objection was taken to the maintainability of the petition on the ground that the new Code of Criminal Procedure (Act XVIII of 1923) had abolished such sanction and that was the law applicable to the case. Petitioner contended that the right to move the High Court under S. 195 (6) for sanction was of the nature of a substantive right, such as a right of appeal, which could not be taken away by any alteration of the processual law.

Held that the right conferred by S. 195 (6) of the Old Code was not a right in the nature of a right of appeal, that the amendments made by the new Code did not take away any substantive right and merely affected procedure, and that the petition was therefore unsustainable.

Petition praying that in the circumstances stated therein the High Court will be pleased to set aside the order dated 24th April, 1923 of the Court of the Additional District Magistrate, Tanjore in Cr. M. P. No. 17 of 1923 revoking the sanction accorded for the prosecution of the respondents herein by the order of the Court of the Sub-Divisional Magistrate, Tanjore in M. C. No. 48 of 1921.

K. S. Jayarama Iyer for petitioner.

A. V Viswanatha Sastri for the respondents.

V L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

Odgres, J.

ORDER :—*Odgers, J.* :—This is an application to set aside the order of the Additional District Magistrate of Tanjore wherein he revoked the sanction to prosecute the respondents granted by the Sub-Divisional Magistrate of Tanjore. The application is under S. 195 of the Criminal Procedure Code which has been amended by Act XVIII of 1923. The old

*Crl. M. Petn. No. 374 of 1923 — 3rd December, 1923.

section allowed application to be made by a private party. This has now been abolished by the amended section and no Court can take cognizance of any offence punishable under Ss. 172 to 188 of the Indian Penal Code, except on the complaint in writing of the public servant concerned, etc., or of the Court when such offence is alleged to have been committed in, or in relation to, any proceeding in that Court. Mr. A. V Visvanatha Sastriar, who appears for the respondents, takes more than one preliminary objection. We have only heard him so far on one, and that is the question whether sanction proceedings can now be entertained under the Criminal Procedure Code as amended. Mr. Visvanatha Sastriar maintains that this is not an appeal under S. 195 Criminal Procedure Code and that the amendment of that section has effected an alteration in procedure. Now, it is settled law that new procedure affects *bygone* transactions and alterations in procedure are always retrospective. *Gardner* v. *Lucas* (1). It is conceded by Mr. K. S. Jayarama Iyer for the petitioner that if this is a matter of procedure, the contention of the other side is correct. Mr. Jayarama Iyer however contends that there is a right of appeal given under S. 195 Criminal Procedure Code itself and that this section is self-contained and independent of, or additional to, any other right of appeal given by the Code. If this is an appeal, then the right of appeal inhered in the parties at the time the original application for sanction was made, which was on or before the 8th December 1921, for it is clear law that you cannot deprive a suitor of a right in a pending action of an appeal to a superior tribunal which belonged to him as of right. *Colonial Sugar Refining Company* v. *Irving* (2). So that, if this is an appeal, we can hear the petition ; if this is not an appeal, but a mere matter of procedure, then, alterations in procedure being retrospective, we are not at liberty to entertain it. That this is not an appeal under the ordinary appellate chapters of the Code—Chapters 31 and 32—is clear from the ruling in *Bapu* v. *Bapu* (3). That was a decision of the Full Bench where the Court said they were not prepared to dissent from the conclusion arrived at by the Full Bench in *Muthuswami Mudaly* v. *Veeri Chetti* (4). They added " we think however, the power conferred upon this Court by S. 195 (6) Criminal Procedure Code is not a part of the ap-

1. (1878) L R 3 A C 582 at 603. 2. (1905) A C 369.
3. I L R 39 M 750 22 M L J 419 (F. B.)
4. (1906) I L R 30 M 382 : 17 M L J 266 (F B.)

pellate and revisional jurisdiction of this Court conferred by chapters 31 and 32 of the Code of Criminal Procedure. It is a special power conferred by S. 195 (6) Criminal Procedure Code." They decided that when the judges are equally divided on a question under S. 195 the matter is governed by S. 36 of the Letters Patent and not by S. 429 or 439 of the Criminal Procedure Code. The bearing of this case on the case in *Muthuswami Mudaly* v. *Veeri Chetti* (4) will be considered in a moment. Meantime it is instructive to refer to the opinions of the referring judges because, in the first instance, there were differing judgments and also an order of reference to the Full Bench, in all of which the matter was considered in some detail. Sundara Iyer, J., in his first opinion held that cls. 6 and 7 of S. 195 Criminal Procedure Code do not provide on terms that an appeal lies from an order granting or refusing sanction, nor does chapter 31, relating to appeals, provide that an appeal shall lie from such an order, that the power of the superior Court under those clauses is similar to what it possesses in appeals and that the same may be said of the powers of the High Court in proceedings in revision. As to the language of S. 429, Criminal Procedure Code, the learned Judge was of opinion that the language referring to the powers of a Court of appeal under S. 195, Criminal Procedure Code was employed "only because it is the Court to which an appeal lies from the decisions of the Court granting the sanction that has got power to revoke a sanction or to give a sanction refused by an inferior Court." Spencer, J. also held that there was no rule of law which subjects applications made under the special provisions of S. 195, Cr. P. Code to the periods of limitation contained in the Limitation Act. The learned Judges therefore in their first judgments both concurred that an application under S. 195 (6), Cr. P. Code cannot strictly be regarded as an appeal. To come to the Full Bench decision in *Muthuswami Mudali* v. *Veeri Chetti* (4), that case decided, that the right of appeal conferred by S. 195 (6), Cr. P. Code, as read with sub-clause 7, is not restricted to a right of appeal to the appellate Court to which the Court of first instance is immediately subordinate. It also decided that a revocation of a sanction is a refusal of a sanction in the same way as an order confirming a grant of a sanction is giving of a sanction for the purposes of the section. *Muthuswami Mudali* v. *Veeri Chetti* (4)

4. (1906) I L R 30 M 382 : 17 M L J 266 (F B).

Nataraja Pillai v. Rangasami Pillai

Odgers, J.

followed *Palaniappa Chetti* v. *Annamali Chetti* (5), where it was held 'that under sub-S. (6) a petition by way of appeal lies to the High Court in every case in which a civil or criminal Court subordinate to it within the meaning of sub-S. 7 (*a*) gives or refuses a sanction whether in respect of an offence committed before it or in respect of one committed before a Court subordinate to it, and in the latter case, whether it gives a sanction refused by the subordinate Court or revokes a sanction accorded by such Court. In all these three cases it is to be noted that the main question before the Court was, put shortly, whether there was one right of appeal or more than one, and what *Palaniappa Chetti* v. *Annamali Chetti* (5) and *Muthuswami Mudali* v. *Veeri Chetti* (4) decided is that in such a case there is more than one right of appeal. This is the point on which *Bapu* v. *Bapu* (3) confirmed *Muthuswami Mudaly* v. *Veeri Chetti* (4). As stated above *Bapu* v. *Bapu* (3) went further and held that the power conferred by S. 195 (6), Cr. P. Code is not part of the appellate and revisional jurisdiction conferred by Chapters 31 and 32, Cr. P. Code. S. 404, Cr. P. Code says that "no appeal shall lie from any judgment or order except as provided for by this Code." It is therefore necessary in my opinion to find a distinct and definite right of appeal given by S. 195, Cr. P. Code itself before it can be assumed that any such right of appeal exists. Now, sub-S. 6 says that "any sanction given or refused under this section may be *revoked* or *granted* by any authority to which the authority giving or refusing it is subordinate, etc." The wording itself seems to point to an original refusal or an original grant by the High Court as a superior authority itself. Sadasiva Aiyar, J. in *Panchalu Reddi* v. *Chinna Venkata Reddi* (6) says that the powers given by S. 195 (6) of the Cr. P. Code to the superior "authority" is a specific statutory power. Though it is usual to call the application to the superior authority a petition of appeal, the learned Judge doubted whether it could be called an appeal. And in *Subbasari* v. *Emperor* (7) the same learned Judge was inclined to hold that the application to the appellate Court to revoke or grant a sanction granted or refused is not an appeal, but an original application. In *Public Prosecutor* v. *Raver Unnithiri* (8) it was said that a con-

5. (1902) I L R 27 M 223 : 14 M L J 74.
4. (1906) I L R 30 M 382 : 17 M L J 266 (F B).
3. (1911) I L R 39 M 750 : 22 M L J 419 (F B).
6. (1918) I L R 42 M 96 : 35 M L J 686. 7. (1921) I L R 44 M 47.
8. (1914) 26 M L J 511

Nataraja Pillai v. Rangasami Pillai

Odgers, J.

firmation of sanction by the appellate Court is equivalent to a fresh grant of sanction by that Court. No doubt, S. 439, Cr. P. Code in speaking of the High Court's power of revision, confers on the Court any of the powers conferred on a Court of Appeal by Ss. 195, etc. But I am of opinion, which I think is supported by authority quoted above, that the " Court of Appeal " referred to is only a designation of the superior authority to which application for revocation or grant is to be made. Further, it will be noted that S. 429, Cr. P. C. which provides for a difference of opinion between Judges composing the Court of appeal, is not confined to appeals under Chapter 31, whereas S. 428 (1), Cr. P. Code deals with appeals under " this Chapter. " This distinction is important in relation to the decision in *Bapu* v. *Bapu* (3) which held that cl. 36 of the Letters Patent applied and not S. 429, Cr. P. C. on a difference of opinion between the Judges composing the superior Court to which application is made under S. 195 (6), Cr. P. Code. Further, I am of opinion that the alterations made by the amendments to the Code are merely alterations of procedure. Prosecuions for various offences committed in relation to proceedings before public servants or Courts are still *punishable*, but those proceedings are to be initiated on complaints either of the public servants or the Courts concerned themselves and not on the application for sanction to prosecute by a private party. The public servant or Court will still generally be set in motion by the party aggrieved though of course it will be open to either to take proceedings *suo motu*.

For these reasons I am of opinion that no appeal is provided for in the Code under S. 195, Cr. P. Code and further that the amendments made affect only procedure. We have therefore since the amendment no power to entertain this petition, which must be dismissed.

Wallace, J.

Wallace, J. :—This is a petition to set aside an order of the Additional District Magistrate, Tanjore, revoking the sanction granted by the Sub-Divisional Magistrate, Tanjore, for the prosecution of the respondents for an offence under S. 188, Indian Penal Code.

A preliminary legal point is raised by the respondents, namely that, since the new amended Cr. P. Code has abolished such sanctions and since that is now the law in force in this case, this petition does not lie. The petitioner rejoins that the right to move this Court for sanction is of the nature of a

3. (1911) I L R 39 M 750 . 22 M L J 416 (F B).

substantive right, such as a right of appeal, which cannot be taken away by any alteration of the processual law. I think the respondent's contention must be upheld for two reasons : first, that there is no substantive right now taken away ; and the right conferred by the old S. 195 (6) of the Cr. P. Code is not a right in the nature of a right of appeal ; and secondly, to comply with the petitioner's request and grant a sanction now, would be futile proceeding since no Court can now take cognizance of complaints under any such sanction.

To take the first point the substantive right which the petitioner possesses is the right of setting a criminal prosecution in train against a party who has committed a breach of an order under S. 144, Cr. P. Code. The necessary preliminary under the old S. 195 (1) to such a prosecution was the obtaining by the party of a sanction or the prosecution of a complaint by a public servant named therein. Now the method of proceeding by first obtaining a sanction has been abolished. Clearly the change is a change in the processual law and does not deprive the petitioner of his substantive right to set the criminal law in motion. The petitioner still has a method under the new procedure for setting the law in motion, since he may apply to the public servant, or any authority to whom that public servant is subordinate to present a complaint.

Such an application as is now before us is not defined anywhere in the old Criminal Procedure Code as an appeal, nor do any provisions of Chapter 31 extend to it. The petitioner points out that under S. 439, old Criminal Procedure Code, it was laid down that the High Court may in proceeding under that section exercise any of the rights conferred on "a Court of appeal" by Ss. 195, etc., which seems to imply that S. 195 confers some powers of the nature of appellate powers on a superior Court, and the omission of S. 195 in the new S. 439 emphasises the fact that the phrase "Court of appeal" as hitherto used had reference to the powers conferred on Courts in the matter of sanctions now abolished. However the question whether, in taking proceedings under the old S. 195 (6), this Court is a Court of appeal has been fully discussed in the Full Bench case of this Court reported in *Bapu* v. *Bapu* (3), which lays down that the power exercised under the old S. 195 (6) is neither appellate nor revisional power, but a special power. The previous rulings of this Court which

3. (1911) I L R 39 M 750 · 22 M L J 416 (F B).

Nataraja Pillai v. Rangasami Pillai

Wallace, J.

used the words ' appeal ' and ' appellate Court ' with reference to these powers, for example, *In re Paree Kunhammed* (9), *In re Muthu Krishna Pillai* (10), *Palaniappa Chetti* v. *Annamalai Chetti* (5), *Muthuswami Mudali* v. *Veeri Chetti* (4) *Jamna Doss* v. *Sabapathy Chetty* (11) must therefore be taken to have been using these words loosely and not with strict technical accuracy. S. 439 also indicates plainly enough that the powers of this Court as a Court of appeal under the old S. 195 (6) are to be found in that section alone and are limited to the terms of that section. It is significant that there was no other section which laid down that the powers of the High Court under the old S. 195 (6) Criminal Procedure Code, consisted of any of the powers which were under the old Ss. 423, 426, 427 and 428, the other sections quoted in S. 439, conferred on it. Another significant fact is that no where was any period of limitation fixed for petitions under S. 195 (6), whereas a regular right of appeal has always a defined period fixed within which it must be exercised. Old S. 195 (6) to my mind, indicates that, in a case like the present, the power of the Court as a " Court of appeal," to adopt the phraseology of old S. 439 is limited to granting a sanction refused by the lower appellate Court, which sanction is a fresh sanction and is not a revival or resuscitation of the original sanction granted by the original Court which had been revoked by the lower appellate Court. No reported case controverting this view has been quoted to us. There is no reported case in this Presidency, so far as I know, which *e. g.*, lays down that when a sanction has been granted and revoked and again granted, the six months are to date from the date of the original grant as if that had been resuscitated. The case reported in *In re Muthu Krishna Pillai* (10) is not in point, as there the original sanction had never been interfered with.

The same result will be obtained by considering the matter from another point of view. Assuming, without deciding, petitioner's contention that, for the purposes of a petition under old S. 195 (6) the District Magistrate as a public servant is within the meaning of S. 195 (1) subordinate to this Court, it is clear that petitioner might have applied in the first instance in this Court for the sanction he now seeks. It follows that

9. (1902) I L R 26 M 116. 10. (1902) I L R 26 M 190.
5. (1902) I L R 27 M 223 : 14 M L J 74.
4. (1906) I L R 30 M 382 : 17 M L J 266 (F B).
11. (1911) I L R 36 M 138 : 21 M L J 1074.

Natarja Pillai v. Rangasami Pillai

Wallace J.

his right to move this Court does not depend on there being in existence an order against him against which he can "appeal." Such right as was given him by the section was a right to apply to this Court for a sanction, irrespective of what had happened to similar applications in any Court subordinate to this Court.

For the above reasons I hold that petitioner's right to apply for a sanction is purely a matter of processual law and not a right of the nature of a right of appeal.

As to the 2nd point, it rests on petitioner's contention that the grant of sanction by this Court will restore the sanction of the original Court so as to enable the prosecution already instituted on that sanction to continue from where it left off when the sanction was revoked ; that is, in his view, the revocation of sanction has not destroyed the sanction but merely holds it in abeyance if and while an appeal is pending. The petitioner goes further and contends that, since the Criminal Procedure Code does not contemplate a case once begun ending merely because a requisite sanction had not been obtained or because the sanction on which it was instituted has been revoked, no subsequent discovery of absence of sanction or revocation of sanction can interfere with its jurisdiction. Such a position, I must hold to be untenable, since it would imply that the right to have a sanction revoked would be quite futile, if a complaint based on a sanction had already been put in, since on this theory any subsequent revocation would not affect the jurisdiction of the Court to proceed with the trial of the complaint already filed. The petitioner appeals to S. 537 of the Criminal Procedure Code for his position : but it does not really help him since that section has no application to cases *under trial* when it is discovered that no sanction exists or that the sanction given has been revoked. Obviously the Court has power to discharge or acquit an accused person of a charge which requires previous sanction if, in the course of the trial and before judgment is pronounced it is brought to its notice that no sanction has been obtained, and I can see no difference between such a case and a case where the sanction on which the trial is proceeding has been set aside during the trial. Revocation of a sanction must have some legal effect and can only imply, to my mind that the prosecution started under the sanction can proceed no further and has come to an end.

For reasons already given, I have held that the petitioner can now ask, and is now asking, this Court only to grant a fresh

Nataraja Pillai v. Rangasami Pillai

Wallace, J.

sanction and that this is not a petition of appeal against, or a petition to revise, any order of the lower Court and for reasons now given I hold that the original sanction given has, by the revocation, been swept away for ever and cannot be revived by any order on this petition.

The new Criminal Procedure Code has abolished the right to present such a petition and this petition must be heard under the existing processual law. That law now forbids any prosecution being instituted merely upon a sanction granted to a private party. It follows then that, even if this Court does grant the petitioner the sanction that he seeks, such a sanction would be of no avail for instituting any prosecution ; and this is an additional reason for refusing to grant the petitioner the sanction which he seeks, since to grant it would be a merely empty formal proceeding of no use whatever to the petitioner.

As I have already pointed out, the petitioner is not left without a remedy, since it is still open to him to move the authorities to whom the Additional District Magistrate is subordinate within the meaning of S. 195 (1) to present a complaint on which the respondents may be prosecuted for their disobedience of the order passed by the Original public servant.

I therefore agree that the petitioner's petition is not maintainable and must be dismissed.

A. S. V. *Petition dismissed.*

FULL BENCH.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE K. C. *Chief Justice*, MR. JUSTICE COUTTS TROTTER, AND MR. JUSTICE RAMESAM.

James Ralph Freer *Appellant** (*Plaintiff-Petitioner.*)

v.

H. A. Johnson *Respondent* (*2nd defendant-co-respondent*).

Freer v. Johnson

Damages—Divorce—Wife's adultery—Liability of co-respondent—Measure of damages—Practice.

In a husband's suit for divorce on the ground of the wife's adultery with the co-respondent, the Court can, if the adultry is proved, award damages against the co-respondent. But the damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention

*Appeal No. 416 of 1922, 19th October, 1923.

F. B.

Freer v. Johnson

that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife.

When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with according to well-established principles. The sum may be ordered to be paid out to the plaintiff, but this is an exceptional course. The money may also be settled on the wife or her children.

Appeal against the order of the District Court of Trichinopoly dated 30th March 1922 in O. S. No. 1 of 1920.

V. V. Srinivasa Iyengar and *T. Krishnaswamy Iyengar* for appellant.

Respondent not represented.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—In this divorce case the petitioner and the Co-respondent are both engine-drivers. The trial Judge has found the respondent guilty of adultery on the evidence of her having given birth to a child over a year after leaving the petitioner, and granted a decree of divorce. He has exonerated the co-respondent from the charges of adultery brought against him, and dismissed him from the suit with costs. The petitioner asks that the decree be confirmed and appeals against the exoneration of the co-respondent and asks for damages and costs against him. There was a considerable body of evidence against the co-respondent on which the trial Judge refused to act, although he did in the course of his judgment say that in course of time the intimacy between the respondent and the co-respondent appeared to have overstepped the bounds of decency. There was fairly direct evidence of adultery given by the petitioner's mother and son, and this the Judge definitely disbelieved though, in my view, on inadequate grounds. There was also a considerable body of other evidence directed to show inclination to *plus* opportunity for adultery, acts of familiarity between the two, circumstances under which they were alone together when adultery may have taken place, constant association between the two, meetings arranged at out of the way places, and the like. To this must be added the admitted fact that the respondent gave birth to an illegitimate child, and no evidence or suggestion of any other person being the father was given, and the somewhat curious denials given on oath by the respondent and the co-respondent themselves. She gave no denials in examination-in-chief, but in answer to the co-respondent said " The co-respondent had nothing to do with me sexually. I have my own resources and live

F. B.

Freer
v.
Johnson

Sir Walter Schwabe, C J.

on them"; and he said "I never did anything to make the respondent misbehave or leave her husband," and "I had no indecent relationship with the respondent when she was at Madura," and nothing else on the subject. Now, it was definitely alleged that they had for some time been living together in the co-respondent's house. His answer was that his sister and others were living there and that the respondent was a friend of the sister; but no evidence was called to corroborate this. Indeed the respondent devoted attention mainly to proving ill-treatment by the petitioner, and neither seems to have taken much trouble to disprove the adultery alleged. It is possible that this was partly due to expressions that fell from the Judge indicating that he was not satisfied with the petitioner's case. On the evidence there was an overwhelming case against the co-respondent and, loathe as I am to disagree with the trial Judge's findings of fact, the reasons he gives for disbelieving the evidence are so unconvincing, that I think we must reverse his decision and find the co-respondent guilty.

There remains the question of damages. The damages in divorce are not punitive. The means of the co-respondent are an irrelevant consideration except in so far as they were of assistance to him in seducing the wife. It is not the intention that a man should make a profit out of the dishonour of his wife. The only question is what the petitioner has lost in his wife. Whether the co-respondent can pay that loss or not is immaterial. When damages have been assessed, in the absence of an order to the contrary, they must be brought into Court and dealt with in pursuance of the Judge's order. They may be ordered to be paid out to the petitioner, but this course is the exception and not the rule. They may be settled on the wife, or on her children, or otherwise dealt with in the discretion of the Court on now well established principles.

In this case I doubt if the petitioner has lost anything by the act of the co-respondent. The home was clearly an unhappy one owing to the incompatibility between the wife and the husband and the husband's mother. The wife took little or no part in looking after the petitioner's house or his comfort: and he derived little pleasure from her society. She left him long before he commenced proceedings, and it is not proved that the co-respondent in any way persuaded her thereto. She was of easy virtue and of a gregarious and pleasure-loving disposition.

F. B.

Freer v. Johnson

Sir Walter Schwabe, C. J.

There were no children of the marriage to be provided for or the burden of whose up-bringing has been left to the deserted husband. The husband has no doubt been put to some expense in having his marriage dissolved. I do not accept his statement that he has injured his prospects with his Railway Company owing to the co-respondent's association with his wife, and I can find no other element of damages present. He will get his costs here and below and Rs. 100 to cover any loss he has suffered.

The decree is confirmed as regards divorce, but varied by finding the co-respondent guilty of adultery with the respondent The appeal will be allowed with costs here and below against the co-respondent. The costs of the co-respondent, if paid, must be returned and the co-respondent must pay Rs. 100 as damages, such damages to be paid to the petitioner.

Coutts Trotter, J., Ramesam, J.

Coutts Trotter, J :—I agree and have nothing to add.

Ramesam, J. :—I agree.

A. V. V. *Decree varied.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESEN :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Rukmani Ammal *Appellant** *(1st Defen- and 2nd defendant) (Ap-*

v.

Narasimhachariar and another *Respondents (Plaintiff and 2nd defendant) (Appellant and 2nd respondent).*

Rukmani Ammal v. Narasimhachariar

Hindu Law—Partition—Sisters—Survivorship—Right to, when lost.

Two step-sisters, who inherited their father's properties after the death of his widow, divided his immoveable properties under a partition deed which after reciting a prior partition of moveables allotted various items of land to each of the sisters and closed with the following clause :—" Henceforth the only relationship between us will be one of friendship and not of property." *Held,* on a construction of the document, that the parties intended not merely to give their present right to the properties but to exclude the right of succession by survivorship in case one of them predeceased the other.

Muttu Vaduganadha Thevar v. *Dora Singha Thevar,* I L R 3 M 290 ; *Gomathi Ammal* v. *Kupputhayi Ammal,* 14 M L J 175 ; *Subbammal* v. *Lakshmana Aiyar,* 26 M L J 479 distinguished.

Appeal against the order of the District Court of Coimbatore in Appeal No. 283 of 1921 dated 12—10—1922 (O. S.

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*A A O No. 85 of 1923. 7th December, 1923.

Rukmani Ammal v Narasimhachariar

No. 720 of 1921 on the file of the Court of the District Munsif of Erode).

A. Krishnaswami Iyer for appellant.
N. S. Rengaswami Aiyangar for respondent.

The Court delivered the following

Waller, J

JUDGMENTS :—*Waller, J* :—The question for decision is as to the proper construction of a partition deed executed by two step-sisters. They inherited the properties of their father after the death of his widow. The moveable properties they divided without a deed and the immoveable by the deed in question nine years after, one of them, Janaki by name, died leaving a will in favour of the plaintiff. The will is disputed by the other sister who claims the property by right of survivorship. The partition deed is Ex. A It refers to the fact that the moveable properties had already been divided, allots a decree to one sister and an usufructuary mortgage to the other and divides the immoveable properties between them. It closes with the sentence "Henceforth the only relationship between us will be one of friendship and not of property." The question is whether they intended by this expression to exclude the right of succession by survivorship. It is argued that their intention was merely to give up their present and not their future rights.

The phrase used in Ex. A is sometimes to be found in deeds of partition between males. In such cases there is no question of right of survivorship and the phrase would seem to carry no special significance. In a case like this, however, there is a question of a right of survivorship and the phrase might well have been intended to carry a special significance.

Several rulings have been cited. The first is *Muttu Vaduganadha Tevar* v. *Dora Singha Thevar* (1). A partition deed was relied on in which occurred precisely the same phrase as is now under consideration. The finding was (*vide* page 339) that the right renounced in the partition deed was absolutely different from the right in contest in the subsequent litigation. The decision does not, I think, help the appellant. Here each sister renounced "henceforth" all right to the other's share and they cannot but have had in contemplation the certainty that one of them would predecease the other.

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1. I L R 3 M 290.

Rukmani Ammal v. Narasimhachariar — Waller, J.

The next ruling, *Gomathi Ammal* v. *Kupputhayi Ammal* (2) is of no greater service to the appellant, for the finding was that the sisters could not have had in contemplation the renunciation of the right of survivorship, as they believed themselves to be entitled to an absolute estate. Had they known that their estate was limited the language of the deed—that thereafter the connection between them was to be that of blood only might have led the Court to a different conclusion. The Munsif in this case has entirely failed to grasp the real significance of the ruling.

The last ruling is no more favourable to the appellant. It is *Subbammal* v. *Lakshmana Iyer* (3). In that case certain expressions had been used in a deed which were not very apt to the occasion but had been interpreted by the lower Courts as excluding the right to succeed by survivorship. The High Court held that all doubt would have been set at rest had the more usual words that " the parties henceforth had no connection of property but only of blood " been added. The Munsif interprets the ruling as meaning that it is essential that all the three expressions should be present in order to justify the inference that the right of survivorship had been renounced. He is, I think, wrong. It seems to me clear that the High Court regarded the first two phrases as being of doubtful import and the third as quite conclusive.

In the result, I think that the learned District Judge rightly interpreted the partition-deed and would dismiss the appeal with costs.

Krishnan, J. :—I agree that the construction placed in Ex. A by the District Judge is correct and that this appeal fails and is dismissed with costs. Krishnan, J.

A. V. V. *Appeal dismissed.*

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2. (1903) 14 M L J 175. 3. (1914) 26 M L J 479.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLER.

P. Venkatachalam Chetty *Appellant* (Defendant).*

v.

P. S. Govindaswami Naicker *Respondent (Plaintiff).*

Venkatachalam Chetty v. Govinda swami Naicker.

Probate and Administration Act, S. 3—Deed—Construction—Gift or will—No disposal of any immediate interest in property.

A document purported to dispose of a part of a house to which the donor was entitled, in these terms :—"You (donee) shall yourself after my life-time use and enjoy the two rooms......................I shall myself enjoy the rent in respect of the two rooms as long as I may be alive. You shall yourself use and enjoy after my life-time that rent and the two rooms from son to grandson with power of sale etc. To this effect is the gift deed executed and given in respect of the aforesaid two rooms." *Held* that the document, though in form a deed of gift, was in fact a will. It was a declaration of the intentions of the donor with respect to her property after her death inasmuch as there was no disposal of any immediate right of possession or any immediate interest in the property. In wills in this country it is not uncommon for the donor to reserve to himself a life-interest in he property disposed of and such a reservation is not conclusive against the document being testamentary in its character.

Thakur Ishri Singh v. *Thakur Baldeo Singh* 10 C 742 Relied on.

On appeal from the Judgment of the Hon'ble Mr. Justice Kumaraswami Sastri, dated the 30th day of August, 1922, in the exercise of the Ordinary Original Testamentary Jurisdiction of the High Court in T. O. S. No. 11 of 1921.

B. Sitarama Rao, K. P. Ramakrishna Iyer and *K. B. Renganatha Iyer* for appellants.

K. Doraisami Iyengar for respondent.

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—This is an appeal from a Judgment of Kumaraswami Sastri, J. in which he found that a document dated November 10th, 1913, described as a gift deed was in fact a will. He found that it was duly executed and declined to go into the question whether certain property which passed under that document had been disposed of between the date of the will and the date of the death of the testatrix. There was ample evidence as to the execution of the document, three witnesses being called who swore that they saw the testatrix affix her mark in their presence. He believed that evidence and I can find no reason for suggesting that that decision is wrong. The

*O S Appeal No. 106 of 1922. 14th November, 1923.

Venkatachalam Chetty v. Govindaswami Naicker

Sir Walter Schwabe, C. J.

question whether the document is a will or a gift is more difficult. It is contended that it is in effect a deed of gift operating *in presenti* and not a will at all, and that as it is a deed of gift in respect of immoveable property which has not been registered, it is void and has no effect. A will is defined in S. 3 of the Probate and Administration Act (V of 1881), as "the legal declaration of the intentions of the testator with respect to his property, which he desires to be carried into effect after his death." This document which, as I have said, is described as a gift deed purports to dispose of part of a house. The relevant portions of the document are as follows :—"You shall yourself after my life-time use and enjoy the two rooms built on the ground of the house Municipal No. 11 I shall myself enjoy the rent in respect of those two rooms as long as I may be alive. You shall yourself use and enjoy after my life-time that rent and that ground and the two rooms from son to grandson and so on in succession with power to gift, mortgage, exchange and sale. No one has any right to or interest in those rooms. To this effect is the gift deed document executed and given in respect of the aforesaid two rooms and their grounds." In form it is a deed of gift and not a will, but in fact it is a declaration of the intentions of the donor with respect to her property which she desires to be carried into effect after her death, because there is no disposal of any immediate rights of possession or any immediate interest in the property. The fact that the document purports to reserve a life interest in the property to the donor is an argument against its being a will, but as was pointed out by the Privy Council in *Thakur Ishri Singh* v. *Thakur Baldeo Singh* (1), no great attention need be paid to that, because it is a frequent thing in this country to find documents which are in fact wills in terms making clear that the person disposing of the property reserves a life or immediate interest in the property. The various things to consider in arriving at a decision as to whether a document is a will or a gift are discussed in that Judgment in page 800. The document before their Lordships was very different to this, but there were certain matters in common between the two which were relied upon by their Lordships, and, in particular, the fact that the document in that case did not purport to give anybody to any possessory or present interest until the death of the donor. A

1. I L R 10 Cal 792, 802.

Venkatachalam Chetty v. Govindaswami Naicker.

Sir Walter Schwabe, C. J.

clear instance of a document which should be held to be a gift or a deed of settlement, and not a will, is to be found in the case of *Rajammal* v. *Authiammal* (2), where the donor gave to his wife and daughter-in-law, the latter of whom was claiming maintenance, some property and provided that that property during his life-time should be held by the donees for him, that they should receive Rs. 5 per month until his death and that after his death they should have the property absolutely. It was held that that was a deed of gift and not a will. We have to consider the proper interpretation of this document, and I have come to the conclusion that it is really a will and not a deed of gift, and I mainly base that view on the fact that the donee gets nothing until the death of the donor. It is true that the document was handed over to the donee, but I find nothing inconsistent with its being a will in that fact.

Lastly it is contended that the legacy granted by this will has been redeemed by reason of the property having been sold after the date of the will to the defendant. I am not clear on the judgment whether the learned Judge intended to give any decision on that point. It is said that it is covered by the sale deed, Ex. II, whereby the testatrix sold certain property to the defendant. I am not satisfied that it is covered by it ; in fact on an examination of the documents and the further evidence, it seems clear that it is not. But that is a matter which it is not necessary to decide now. If and when the legatee tries to obtain possession of the property, there is nothing in this Judgment or in the Judgment of the Court below to prevent the defendant, if so advised, from setting up that this legacy has been in fact redeemed.

The appeal will be dismissed with costs.

Waller, J.

Waller, J. :—I agree. I would only add that in my opinion the question whether the testatrix had power to dispose of the property does not arise in a proceeding of this kind.

A. V. V. *Appeal dismissed.*

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2. (1909) I L R 33 M 304 : 20 M L J 519.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Yezzu Mallayya *Appellant** (*1st Defendant*).

v.

Talluri Punnamma, minor, by next friend Konakalla Punnayya *Respondents* (*Plaintiff.*)

C. P. Code S. 11 *and O.* 32, *R.* 4 (3)—*Minor defendant—Appointment of guardian-ad-litem—Consent of guardian—Express or implied consent—Ex parte decree against minor—Execution sale—Binding character of —Prior suit by minor through next friend to set aside the sale—Dismissal of —Subsequent suit by minor to set aside the decree—Bar of res judicata.* Mallayya *v.* Punnamma.

The question whether or not a person appointed as guardian *ad-litem* of a minor defendant consented to his being so appointed is a question of fact in each case. The consent of the guardian referred to in O. 32 R. 4 (iii) C. P. Code need not be expressed in writing but may be implied from the circumstances of the case.

Chattar Singh v. *Taj Singh,* I. L. R. 43 All. 104 followed.

A guardian of a minor defendant is not bound to waste the minor's money in contesting a suit to which there is no good defence unless it is proved that the minor has been in any way prejudiced by the course the proceedings took or that there has been any fraud or gross negligence on the part of the guardian, the minor would be bound by the decree.

In a suit by a minor to set aside a decree and a sale in execution on the ground that the minor was not represented in the suit, it was found that the minor had previously sued through his next friend to set aside the execution sale and had failed in the previous suit. *Held* that the ground on which the present suit was based viz., that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constituted *res judicata* under Expln. 4 to S. 11 of the C. P. Code.

Arunachalam Chetty v. *Meyappa Chetty,* I L R 21 M 91.

Muhammad Rowther v. *Abdul Rahiman Rowther* I L R 46 M 135 : relied on.

Second Appeals against the decree of the District Court of Guntur in A. S. No. 157 of 1921, preferred against the decree of the Court of the principal District Munsif of Guntur in O. S. No. 414 of 1919.

B. Somayya for appellant.

B. Satyanarayana for respondent.

Ch. Ragava Rao for 3rd respondent in S. A. No. 850 of 1922.

The Court delivered the following

JUDGMENT :—These are second appeals which arise in a suit brought on behalf of a minor by his next friend for set-

*S A Nos. 836 and 850 of 1922. 22nd November, 1923.

Mallayya v. Punnamma.

ting aside the decree in O. S. No. 187 of 1917 obtained against that minor with the present second defendant as his guardian for a certain sum of money due on a promissory note, and also for the setting aside of a sale in execution of that decree, in which the third defendant became the purchaser of certain properties belonging to the minor. The learned District Judge has declared the decree to be invalid but he has upheld the sale in execution of that decree, and in consequence, the plaintiff has appealed in S. A. No. 850 of 1922 and the decree-holder in O. S. No. 187 of 1917 has appealed in S. A. No. 836 of 1922. Both the second appeals have been heard together.

Now, the first question we have to consider is whether the decree in O. S. No. 187 of 1917 should be treated as null and void and not binding against the minor. The only reason urged before us for holding so is that the consent of the second defendant, who was appointed as guardian *ad litem* of the minor, was not obtained beforehand and that therefore his appointment should be treated as a nullity and the suit should be looked upon as having been decreed against the minor without his being properly represented on record. The learned District Judge has no doubt found in the minor's favour on this point, but after considering the point carefully we are unable to agree with him.

The second defendant was appointed in 1913 as the guardian of the person of the minor under the Guardians and Wards Act. The suit No. 187 was brought in 1917, that is, at a time when the second defendant was the certificated guardian of the minor. Notice was issued to the second defendant before he was appointed guardian and the notice was in these terms: "Take notice hereby that Yezzu Mallayya, the plaintiff in the above mentioned suit (O. S. No. 187 of 1917) has presented an application to this Court praying that a guardian *ad litem* for the minor may be appointed and that after receipt by you of the notice of application in the matter of the said minor, you or any friend of the minor be appointed as such before 14—3—1917, the date fixed; and that, in default, the Court shall appoint a separate person as guardian of the minor for purposes of the suit." That notice was served on the defendant personally and it bears an endorsement in these terms "On 27th February 1917 the Court peon having come to the village of Thadikonda and given me, the *guardian-defendant* mentioned in this order, a copy of the notice of application for

appointment of a guardian for the minor, herewith attached, I have received the same. (Signed) Konagalla Venkatasubbarayadu (that is, the second defendant)." It is not disputed that this notice was served on the second defendant personally. On the date fixed for the appointment of the guardian the second defendant no doubt did not appear, and the learned District Munsif, evidently holding that the second defendant was willing to act as guardian, appointed him as guardian of the minor for the suit. He notes "served, absent, appointed." Now, it is contended that, unless there is an express consent on record by the person proposed as guardian that he would act as guardian his appointment as guardian is illegal and the case should be treated as if no guardian had been appointed for the minor. We are unable to accept this argument. All that O. 32, R. 4 (iii) says is that no person without his consent shall be appointed guardian for the suit. No doubt the consent of the person is wanted, but there is nothing in the rule which requires that that consent should be expressed in writing. The consent may be inferred from circumstantial evidence, and in this case, we think the circumstances are such that we are justified in holding that the second defendant did in fact consent to be the guardian of the minor for the suit. He was, as already pointed out, appointed guardian of the person of the minor under the Guardian and Wards Act, and, under clause (iii) of R. 4 of O. 32 he was the person who ought to be appointed as guardian for the suit, unless the Court considered, for reasons which have to be recorded, that it was for the minors' welfare that another person should be appointed. There is nothing here to show that there was any reason for thinking that another person should be appointed for the minor's welfare. That consent can be inferred from circumstances is clear from the ruling in *Chatter Singh* v. *Tej Singh* (1), which we respectfully follow. In these circumstances we must reject the argument that the minor was not properly represented in the previous suit.

It is also suggested that, as the second defendant was the person who executed the promissory note, he had an interest that was adverse to the minor; but, in the particular case he was not a party himself, he not having been sued but only the minor, and there is no reason to suppose that the maternal uncle of the minor would not have put forward a proper defence for the

1. (1920) I L R 43 A 104.

Mallayya v. Punnamma.

minor if there was one. No guardian is bound to waste the minor's money in trying to defend a suit in which the defence will not succeed. The conclusion we have therefore come to is that the decree itself cannot be set aside. It is not proved on the minor's side that she has been in any way prejudiced by the course that the proceedings took or that there has been any fraud or gross negligence on the part of her guardian. This finding is sufficient to dispose of S. A. No. 836 : but there is still another ground why the minor is bound by this decree and that is the ground of *res judicata.* The minor's present next friend had brought a suit, O. S. No. 79 of 1920, to set aside the sale that was held in execution of this very decree and it would certainly have been a proper ground to take in that suit that the decree was itself null and void, so that the sale would also be null and void but no such plea was put forward. The suit was dismissed against the minor both in the first Court and in appeal. We think the ground that is put forward at present, *viz.,* that the minor was not properly represented in the suit in which the decree was passed, was a ground that might and ought to have been put forward in the previous suit, and that not having been done, the decision in the previous suit constitutes the question *res judicata* under explanation 4 of S. 11 of the Civil Procedure Code. As authority for this proposition we may refer to the case in *Arunachalam Chetty* v. *Meyappa Chetty* (2) and *Muhammad Rowther* v. *Abdul Rahiman Rowther* (3). On this second ground also the plaintiff's claim to set aside the decree fails.

We must therefore allow S. A. No. 836 of 1922, with costs throughout, and set aside the decree of the lower appellate Court in so far as it holds that the decree in O. S. No. 187 of 1917 is invalid.

S. A. No. 850 *of* 1922 will fail in this view. We have already held that there was nothing illegal and invalid in the decree under which the sale took place, and therefore there is no ground for holding that the sale in pursuance of that decree was in any way affected by illegality or was void. We agree with the district Judge in his view that the plaintiff's claim is affected by *res judicata* as regards the sale also. S. A. No. 850 of 1922 must therefore be dismissed with costs.

A. V. V. *Second Appeals dismissed.*

2. (1897) I L R 21 M 91 : 8 M L J 28. 3. (1922) I L R 46 M 135.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C. *Chief Justice* AND MR. JUSTICE RAMESAM.

Velamakanya Krishnayya *Appellant** (*Defendant*).

v.

S. Ponnuswami Iyer and another *Respondents* (*Plaintiff*).

Transfer of Property Act—S. 59 *—Equitable mortgage—Document creating or Document merely recording already completed transaction of—Test —Registration —Necessity—Document creating equitable mortgage unregistered—Proof of mortgage by proof of fact of deposit of title-deeds—Permissibility.* Krishnayya *v.* Ponnuswami Iyer.

The test to find out whether a document is in itself an equitable mortgage and requires to be registered, is, does the document constitute the bargain between the parties, or is merely the record of an already completed transaction. In the former case, the document must be registered, and is, if it affects immoveable property of the value of Rs. 100 or upwards, inadmissible in evidence unless registered, in the latter case, the document need not be registered. The easiest guide is the question whether or not the money was paid before the making of the document, because, if the money is handed over contemporaneously with, or in exchange for, the document or after the document, it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. The terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it.

Held that the document in question in the case did not itself create the charge, but was merely the record of a charge which had already been created.

Where the document is in itself the equitable mortgage and is inadmissible, because unregistered, the mortgagee cannot prove the equitable mortgage by proof of the fact of the deposit of the title-deeds with him. After the decision of the Privy Council in *Subramanyam* v. *Lachman,* 50 C 338, the decision in *Elumalai Chetty* v. *Balakrishna Mudali,* 41 M L J 297 on this point can no longer be taken to be the law.

On appeal from the judgment of the Honourable Mr. Justice Phillips dated 3rd March 1922, passed in the exercise of the Ordinary Original Civil Jurisdiction of this Court in O. S. No. 348 of 1920.

V. Radhakrishnayya for appellant.

H. Rama Rao for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal from the judgment of Phillips, J., in which he decided that a loan made to the defendant by the plaintiffs' firm secured by promissory notes and by deposit of title deeds was secured by a Sir Walter Schwabe, C. J.

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* O. S. Appeal No. 54 of 1922 30th Novemebr 1923

Krishnayya v. Ponnuswami Iyer.

Sir Walter Schwabe, C.J.

valid equitable mortgage. The facts of the case are that the defendant was a servant in a certain firm and had borrowed from time to time monies from that firm secured by promissory notes and by deposit of title-deeds of his house. The firm dissolved and the plaintiffs' firm took over the assets and liabilities of the firm and continued the defendant in their employment. Shortly after the taking over of the firm they made an advance of Rs. 500 to the defendant and took a promissory note from him for the outstanding amount of his indebtedness to the old firm plus Rs. 500 and at a later date they made further advance to him some secured by promissory notes. About the time of the advance of Rs. 500 the document Ex. B was executed by the defendant and it runs thus. " Collateral security letter in respect of a house executed in favour of Messrs Peruru Viswanadham and Koneti Desikacharyulu Company of Madras. As you have this day obtained an assignment of the sum of Rs. 1,945 due by me to Messrs Peruru Viswanadham and Co., the same being the sum of principal and interest due, I have this day executed a pro.-note in your favour for this sum and the sum of Rs. 500 taken to day, *i. e.,* the total of Rs. 2,445 ; so let it be known that for that I have retained with you as collateral security my document of the Collector's certificate No. 815 in respect of my house bearing door No. 11 in Tiruvateeswaranpet, Madras." This, I understand from my learned brother, is a more accurate translation than that printed in the documents. The defendant says that that document is in itself an equitable mortgage of his house and, as it has not been registered, it cannot be given in evidence.

The law on the subject has on several occasions been said to be quite clear, but the application of the law, as far as I can see, has not been easy. The Privy Council in *Subramanyan* v. *Latchman* (1) applying the principles laid down by Lord Cairns in the leading case of *Shaw* v. *Foster* (2) said, " the test is, did the document constitute the bargain between the parties or was it merely the record of an already completed transaction ?" If it constitutes the bargain, then, on the well-known rule that, where contracts are reduced to writing, you cannot give parol evidence of their contents. In order to prove the mortgage, the plaintiff would have to attempt to put in as evidence the document and, if it is a mortgage document, he would be precluded from so doing by the Transfer of Pro-

1. (1923) I L R 50 C 338 : 44 M L J 602 (P C). 2. L R 5 H L 321.

Krishnayya v. Ponnuswami Iyer — Sir Walter Schwabe, C. J.

perty Act and under the Registration Act. The question in each case, which it is difficult to decide, is whether or not the document does constitute the bargain, or is merely a record of a completed transaction : and I think that when one looks at the cases, the easiest guide is the question whether or not the money was paid before the making of the document, because, if the money is handed over contemporaneously with, or in exchange for, the document or after the document, it will be very difficult to establish that the document did not contain the terms of the bargain between the parties. In order to arrive at the true facts in respect of that question, I think that the first thing to do is to look at the document itself. In many cases, it will appear from the document that the document is handed over before any advance is made ; in some cases it will appear from the document that the document comes into existence in reference to a past advance, as for instance, where an advance is secured by a promissory note and the document giving equitable mortgage of the property as security is dated at a later date than the time of the advance ; and, as a general rule, the terms of the document itself are a better guide to the truth than the verbal evidence given afterwards by persons either trying to escape from the liability or to establish it. The terms of the document are to the effect that the matter had already been completed, and I do not think that this document was made to create a charge. I think it was merely recording the charge which had already been created, and I think it can be said that there was here a completed contract of mortgage before the letter was passed, so distinguishing it from *Bairab Chandra Bose* v. *Anathnath De* (3), where, on the terms of the document there and from the surrounding circumstances, it was held that it could not be said that there had been a completed contract before the letter was passed. I rely mainly on the past tense used in the letter. It says that the promissor has executed the promissory note and that he has taken a sum of Rs. 500 and he purports to inform the new firm that he has left with them his documents as collateral security. I think on the whole it is merely recording the facts for their information and, of course, in order to provide them with strong evidence if necessary, and not making the bargain by the letter.

The oral evidence is not satisfactory. The defendant himself does not make good on his evidence the case for which

3. (1919) 57 I C 686,

Krishnayya v. Ponnuswami Iyer.

Sir Walter Schwabe, C J.

he is contending. The evidence called by the plaintiff is not satisfactory because it is that of gumastas who knew very little about the facts and that of a partner of the firm who, though gives some strong evidence from which it could be inferred that the bargain had been in fact completed before this document, he does not pretend to have been present or to be able to give definite first hand evidence of the facts.

On the whole, I must come to the conclusion that the learned Judge is right. I should add that, in his judgment, he expressed the view that, even if this document did contain the terms of the contract made, it would be possible for the plaintiffs to prove their equitable mortgage by proving the fact of the deposit of the title-deeds with them. In so holding, he was following the decision in *Elumalai Chetti* v. *Balakrishna Mudali* (4), which, I think, in view of the later decision of the Privy Council in *Subrahmaniam* v. *Latchman* (1), can no longer be taken to be the law.

The appeal must be dismissed with costs. The Receivers may take their costs from the estate in the first instance. Six months' time is allowed for redemption.

Ramesam, J.

Ramesam, J. :—I would add that the translation of Ex. B, even in the first sentence, is not strictly accurate. It ought to run, " As I have this day got novated in your favour the sum of Rs. 1,945, etc. " The Telugu is " *Avala* " which means *novation* and not *assignment*. If the plaintiffs' firm are assignees from the old firm, strictly the assignment would have to be by a registered instrument. But no such difficulty arises. I agree with my Lord's judgment.

A. S. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE COUTTS TROTTER AND MR. JUSTICE RAMESAM.

K. Ramaswami Naicker *Appellant** (*Defendant*).

v.

Alamelu Ammal *Respondent* (*Plaintiff*).

Ramaswami Naicker v. Alamelu Ammal.

Res Judicata *between co-defendants—Rule as to—Applicability of—Conditions—Fraudulent benami transfer—Plea of—Maintainability—Covenant for quiet enjoyment—Damages for breach of—Suit for—Plea in.*

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4. (1921) 41 M L J 297. 1. (1923) I L R 50 C 338 : 44 M L J 602 (P C).

*O S No. 52 of 1923. 6th November, 1923.

Ramaswami Naicker v. Alamelu Ammal.

In the course of the insolvency of C., the Official Assignee challenged, as not being *bona fide* and as being without consideration, a transfer of the insolvent's property obtained by R. from a transferee from the insolvent himself, and a transfer made by R. to A. of the same property. A suit brought by the Official Assignee against R. and A. jointly for a declaration that the transfers in their favour must be set aside for want of good faith and like considerations was decreed on the ground that the transferees were not purchasers in good faith, the appellate Court, in that suit, also expressing the opinion that the transfers were not for consideration.

In a suit by A. against R. for damages for breach of the covenant for quiet enjoyment due to her having been ousted by the Official Assignee, *held* (1) that the opinion of the appellate Court in the prior proceeding that the transfer in favour of A. was not for consideration was mere *obiter dictum* and did not operate as *res judicata* between R. and A., and (2) that R. could not plead that the transfer in favour of A. was a benami transaction intended to cheat the creditors of C.

Appeal against the Judgment of the Hon'ble the Chief Justice in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 766 of 1920.

V Varadaraja Mudaliar for appellant.

V V Srinivasa Aiyangar and *A. Narasimhacharya* for respondents.

The Court delivered the following

Coutts Trotter, J.

JUDGMENTS :—*Coutts Trotter, J.* :—This is a curious case which arises out of the rather complicated affairs of a man called Chockalinga Naicker, who was adjudicated insolvent in February, 1915. I have had occasion to go into the story at considerable length on another occasion and I need only, for the purpose of the present case, recapitulate the circumstances very briefly. On the 2nd September, 1910, Chockalingam purported to transfer the lands to Pachaimuthu Naicker for Rs. 2,000. On the 27th June, 1912, Pachaimuthu in his turn transferred them to Ramaswami Naicker, who is closely related in a double way to the insolvent Chockalingam for Rs. 3,000. On the 27th of June, 1914 Ramaswami Naicker purported to transfer the lands to Alamelu Ammal for Rs. 4,550. In the course of the insolvency of Chockalingam, the Official Assignee challenged these alienations. He challenged them as being not *bona fide* and as being without consideration, and the end of that was that I tried a proceeding in which the Official Assignee, as representing the estate of Chockalingam, sued Ramaswami Naicker and Alamelu Ammal jointly in order to get it declared that these transactions must be set aside for want of good faith and like considerations. In those proceedings Ramaswami Naicker and Alamelu had exactly the same

Ramaswami Naicker *v.* Alamelu Ammal.

Coutts Trotter, J.

interest, *viz.*, to resist the contentions of the Official Assignee on both points. They failed. It was held by me that the garnishees had not shown that they were purchasers in good faith, and I undoubtedly used expressions which indicated, let us say, some suspicion as to whether the purchases were for valuable consideration. But, reading my own judgment, it seems to me clear that I took very good care not to decide that point. It went on appeal and my decision was confirmed by the late Chief Justice and Napier, J. and, no doubt, they did use language which went a good deal further than mine with regard to the question of consideration or want of consideration. The present Chief Justice, who decided this case on the Original Side, has indicated the view that, even if the appellate Court must be taken to have expressed the opinion that there was no consideration in that case having regard to the fact that they agreed with the finding on which I dismissed the suit, namely, that there was a lack of good faith, that was the real ground of decision and that the other ground was *obiter dictum* being a mere expression of opinion not necessary for the decision of the case. The suit which was tried by the Chief Justice arose in this way. There was a suit brought by Alamelu Ammal against her vendor Ramaswami Naicker and she said, " Here is this conveyance in my favour. I have been ousted by the action taken by the Official Assignee. You must indemnify me for the loss on my bargain and pay me damages based on the value of the land at the time that you failed to carry out your undertaking as embodied in the covenant for quiet enjoyment which is part of the sale deed. " To that the only answer that is vouchsafed is this—at least that is the only point pressed before us—that, because the Court in those proceedings had to try whether there was a valid transfer away from the estate of Chockalingam and whether the lady Alamelu Ammal and Ramaswami Naicker, who were the garnishees who were resisting the attack in that case, were free from the charge of having in their hands property belonging to the insolvent's estate, it must be considered that the Court decided in that case that the transaction was a fraudulent one for all purposes and that their determination in those proceedings was binding in these proceedings against the two garnishees. It is clear that, in certain circumstances, a judgment may act as *res judicata* as between two co-defendants when they litigate against one another subsequently. That doctrine while recognised is strictly circumscribed both by the English and by the Indian

Ramaswami Naicker v. Alamelu Ammal. — Coutts Trotter, J.

Law. The *locus classicus* is the judgment of Vice-Chancellor Wigram in *Cottingham* v. *Earl of Shrewsbury* (1), where he says this: "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants, the Court will try and decide that case, and the co-defendants will be bound. But if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains." That principle was acted on and carried out in *Ramaswami Aiyar* v. *Ponnuswami* (2), a Letters Patent Appeal, where a Bench of three Judges—the present Chief Justice, Oldfield, J. and myself—held that the principle was well-established that there could be no estoppel created between co-defendants so as to invoke the doctrine of *res judicata* unless there was a *litis Contesttio* as between those defendants *inter se*. There is no trace of such a thing here and we must therefore hold that the judgment of the appellate Court in the former insolvency petition, No. 62 of 1915, does not so act in this case, and as the learned Chief Justice points out, it may very well be that, even supposing that this lady was consciously intermeddling in these somewhat murky affairs of Chockalingam, she had a conveyance direct from Ramaswami Naicker as a guarantee that, if anything went wrong with the estate of Chockalingam, he would stand to her in the position of an indemnifier. One must not forget that Ramaswami Naicker was the son-in-law and brother-in-law of this Chockalingam. That seems to me to be quite sufficient to explain this transaction wihout any supposition at all that they must necessarily be engaged in a common fraud. Even if one has a suspicion of that kind, on the principle of *Doe de Roberts* v. *Roberts* (3) and *Prole* v. *Wiggins* (4), which has been acted upon in this Court in *Kamayya* v. *Mamayya* (5), it would not be possible to act on it here; because the plaintiff having proved a conveyance containing a covenant for quiet enjoyment, the defendant could not be heard to say "That was all a sham; that conveyance was not between me and her at all; it was a fraudulent transfer effected with intent to defeat the creditors of Chockalingam by putting my name as benamidar." On the principle that one *Allegans*

1. 3 Hare 627.
2. (1922) M W N 526.
3. (1819) 2 B and Ald 367.
4. (1836) 3 Bing (N C) 230.
5. (1917) 32 M L J 484.

Ramaswami Naicker *v.* Alamelu Ammal

suam turpitudinem non est audiendus the defendant will not be allowed to set up that case.

In my opinion, the learned Chief Justice came to the right conclusion in this case and this appeal must be dismissed with costs.

Ramesam, J. :—I agree.

A. S. V *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER.

The South Indian Railway Company by their Agent at Trichinopoly *Petitioner** (*Defendant*)

v.

S. P. R. S. Narayana Ayyar *Respondent* (*Plaintiff*).

The South Indian Railway Company *v* Narayana Ayyar

Railway—Goods entrusted to, for transport—Loss in transit—Damages for—Suit for—Limitation—Starting point—Limitation Act—Art. 31*—Applicability—Onus of proof in such suit—Entrustment under owner's risk note—Effect—Theft from running train—Meaning—Railways Act of* 1890*—Ss.* 77, 140*—Subordinate officer like District Traffic Superintendent—Notice to—Validity—Conditions.*

Where goods are entrusted for transport to a Railway Company under an agreement providing that, in consideration of the carriage of the goods at a lower rate, the consignee has no right to compensation for loss of the goods except in the event of wilful neglect of the railway administration or theft by or wilful neglect of its servants during transit, and that a robbery from a running train does not constitute wilful neglect, the consignee suing the Company for damages for the loss of the goods in transit is under a duty to prove neglect on the part of the Company. It will be open to the Company to say that the goods were lost by theft while the train was running, in which case, they will, as a matter of course, be exempted from liability ; but the burden of proof on this point lies on the Railway Company. Theft of goods from a waggon during transit is theft from a running train even if the thief got into the waggon before the train started.

The article of the Limitation Act applicable to a suit by a consignee for damages for the loss of goods in transit is Art. 31, the starting point being the date when the Railway Company finally says that the goods cannot be delivered.

A notice, under Ss. 77 and 140 of the Railways Act of 1890, given to a subordinate officer like the District Traffic Superintendent, is not valid unless there is evidence (1) either that the power of the Agent to receive notices under S 140 had been delegated to the subordinate officer who actually received the notice, or (2) that the Company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the Agent and thus estopped itself from raising a technical defence.

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the Judgment and Decree of the Court of the

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*C R P No. 418 of 1921. 8th November, 1923.

Subordinate Judge of Mayavaram in Small Cause Suit No. 911 of 1920.

V Viswanatha Sastri for appellant.

C. S. Venkatachariar for respondent.

The Court (Ayling, J.) delivered the following

JUDGMENT :—This Revision Petition arises out of a Small Cause Suit in which the respondent, the consignee of a bale of cotton thread entrusted for transport to the South Indian Railway Company, sued the company for Rs. 470 damages for the loss of the said bale in transit. The bale was entrusted to the Railway Company on 2—4—1919. Nothing has been heard of it since and there can be no possible doubt that it must be treated as lost. The loss of the bale is the basis of the suit.

The liability of the company has to be determined with reference to a special agreement Exhibit I entered into between them and the consignor at the time of the despatch of the bale. This provides that in consideration of the carriage of the bale being at a lower rate the consignee (under whom, of course, plaintiff claims) has no right to compensation for loss of the goods except in the event of wilful neglect of the railway administration or theft by or wilful neglect of its servants during transit. It is further provided *inter alia* that a robbery from a running train does not constitute wilful neglect. This question of the liability of the Railway Company has been dealt with by the Subordinate Judge in paragraphs 4 and 5 of his Judgment. The issue framed is this :—

" Whether the bale in question was lost by theft while the train was running and wheher the defendant company took the necessary steps to prevent such a risk ? "

The issue seems to me to have been very badly drafted because there are really two distinct questions involved, the burden of which is not on the same side in each case. Under the terms of the agreement the burden of proving neglect on the part of the company lies on the plaintiff as explained by Kumaraswami Sastri, J., in *P. Albuquerque and Sons* v. *S. I. Railway Company* (1). It is open to the company to say that the bale was lost by theft while the train was running, in which case, they are, as a matter of course, exemped from liability but the burden of proof on this point lies on the Railway Company. The issue framed by the Subordinate Judge does not cover the first point at all. He has set himself

1. (1922) 43 M L J 90.

The South Indian Railway Company v Narayana Ayyar

Ayling J.

simply to consider whether the Railway Company has shown that the bale was lost by theft from a particular wagon number 1897 during transit between Perundurai and Erode. He has laid down the extraordinary proposition that even if the bale was so stolen, it will not be theft from a running train if the thief got into the wagon before the train started, a proposition which seems to me to have no foundation ; and his arguments on the evidence relating to the loading of the bale in the particular wagon specified seem to me to be most inconclusive. I cannot accept the finding such as it is and must call for a specific finding from the Subordinate Judge on the following two issues :—

(i) Was the suit bale lost in consequence of the wilful neglect of the Railway administration or theft by, or wilful neglect of, its servants, transport-agents or carriers ?

(ii) Was it lost by robbery from a running train within the meaning of Ex. I ?

Another point taken by the learned vakil for the petitioner relates to the question of notice. This is governed by Ss. 77 and 140 of the Railways Act, IX of 1890. The former provides that a person entitled to compensation for loss of goods can only recover it if his claim has been preferred in writing by him or on his behalf, to the Railway administration within six months from the date of the delivery of the goods for carriage by rail. S. 140 of the same Act provides for the method of service of notices on the Railway administration. The effect of these two sections has been considered by a Full Bench of this Court in *Mahadeva Aiyar* v. *South Indian Railway Company* (2). In the present case, the plaintiff relies on a notice, Ex. A, which was addressed to the District Traffic Superintendent on 5th September, 1919, within six months of the consignment of the bale. The question is whether those specified conditions of Ss. 77 and 140 have been complied with. Here again, I cannot accept the findings of the Subordinate Judge. The Judgment of the Full Bench above referred to lays down the conditions on which notice to a Subordinate Officer like the District Traffic Superintendent could be deemed sufficient compliance ; and it is sufficient to say that the Subordinate Judge's Judgment is entirely without reference to the conditions therein laid down. I must therefore call for a proper finding on issue II, " whether the suit is barred for want of proper notice,"

2. (1921) I L R 45 M 135 ; 42 M L J 202 (F B).

in view of what is contained in the Full Bench Judgment above referred to.

The last point taken on behalf of the Company is that the suit is barred by limitation. The proper article applicable appears to be Art. 31 of the Indian Limitation Act, IX of 1908. On this point, I think the Subordinate Judge's findings must be accepted. Paragraph 7 of his Judgment deals with it and he relies on a Judgment of this Court in *Madras and Southern Mahratta Ry. Co., Ltd.* v. *Bhimappan* (4). I can see no ground for distinguishing that case from the present one, and it appears to be an authority for the Subordinate Judge's calculation of the time prescribed, from the date when the defendant Company finally said that the bale could not be delivered. I do not think on the question of limitation there is any ground for interference.

Findings on the issues referred to the Subordinate Judge must be returned within two months from this date. Either side will be at liberty to adduce fresh evidence, if they wish, on the two issues which have been referred to, in substitution of issue (1) as originally framed by the Subordinate Judge. Seven days will be allowed for filing objections.

[In compliance with the order contained in the above Judgment, the Subordinate Judge of Mayavaram submitted the following findings :]

On the issues 1 and 2 referred to therein, *viz.,*

(1) Was the suit bale lost in consequence of the wilful neglect of the Railway administration or theft by, or wilful neglect of its servants, transport-agents or carriers ?

(2) Was it lost by Robbery from a running train within the meaning of Exhibit 1 ?

2. A bale of cotton twist was consigned by Ramaswami Chettiar at Tiruppur Station on the South Indian Railway on 2—4—1919 to Tiruvalur, the plaintiff Narayana Aiyar being the consignee. The plaintiff not having received the consignment wrote to the District Traffic Superintendent, Trichinopoly, on 5th May 1919 informing him that he had not received the bale consigned to him and asking the Superintendent to get the bale delivered to him. To this, the Superintendent replied that the matter was receiving his attention (*vide* Exhibit B). On 29th May, 1919, the plaintiff again wrote a letter to the District Traffic Superintendent that the bale had not yet been delivered up to him and that either the bale might be delivered up to him or its value Rs. 438 might be paid to him (*vide* Exhibit C). The District Traffic Superintendent thereupon instructed the Station Master, Tiruvalur, to ascertain from plaintiff what amount he was willing to receive in final adjustment of his claim. The Station Master, after taking a statement from the plaintiff on 30th June, 1919, wrote to the District Traffic Superintendent that at his instance

4. (1912) 23 M L J 511

South Indian Railway Company *v.* Narayana Ayyar.

the plaintiff was willing to accept Rs. 428 and that the said amount may be paid to the plaintiff at an early date (*vide* Exs. G and G1). The plaintiff not having received any further information wrote on 19th August, 1919 to the District Traffic Superintendent requesting him to settle his claim and informing him that on failure to do so, he would have to institute a suit (D). To this, a letter has been sent from the office of the General Traffic Manager on 30th August, 1919 that the bale in question had been stolen away from a running train and as the consignment was booked at owner's risk form note H, the Company is relieved from all liability for loss and that, therefore, the plaintiff's claim could not be entertained (D1). On 28—11—1919, the plaintiff gave a notice to the Agent, South Indian Railway, that unless the full value of the bale was paid to him within two weeks, he will sue the Company for recovering the sum with interest (E). This letter has been forwarded in original to the General Traffic Manager for disposal on 1st December, 1919, and on 12th December, 1919 a reply to the plaintiff has been sent from the office of the General Traffic Manager, that it was reported that the bale was stolen away by some thieves from the train conveying the same while it was running between Perundurai and Erode Stations and that the Railway is not therefore liable as already intimated to the plaintiff in the letter, dated 30th August, 1919, in special view of the contract referred to therein and that the enquiry made with reference to the value of the bale was not an admission of liability on the part of the Company and that the plaintiff's claim cannot, in the circumstances, be admitted (E1). The plaintiff has thereafter instituted his suit on 5th July, 1920.

3. The defendant has raised various pleas. The plaint contains substantially the same facts as are already set forth, and the defence is also the same as disclosed in the replies of the General Traffic Manager. The evidence of defendant's witnesses is to the effect that the suit bale was loaded at Tiruppur on 2nd April in B. N. R. C. G. waggon No. 1897, and that the said wagon was attached to a goods train running on the same day to Erode. My predecessor was of opinion that the evidence as to such loading is not of a reliable character. The goods clerk spoke only from his memory that it was so loaded in waggon No. 1897. The loading book in which the above particulars would have been entered has not been produced on the ground that it could not be found and further Ex. H, the railway receipt, does not also unfortunately contain the number of the waggon in which the bale was loaded, though it should properly contain such information. I am of opinion that, in the circumstances, it cannot be held that the said bale had been actually loaded at Tiruppur in waggon No. 1897. The evidence therefore as to whether there was found any tampering with the seal of the waggon at Erode is of little or no importance. No doubt, there has been an attempt to show that the suit load was found missing at Erode when the waggon was examined. But in the absence of any record as to the waggon having been examined and to the bale having been found missing, the evidence of the defendant's witnesses cannot carry any conviction. It is not disputed that when the Railway officials had found that there was theft in one of the waggons there would be reports sent in writing to the officials higher up. This is admitted by Neelakanta Ayyar, D. W. 5. He states that in addition to this bale there were two other articles missing and that he gave a report of the loss to the District Traffic Superintendent and to the police. But no such report either from the Railway office or from the police is forthcoming. I am, therefore, of opinion that the bale was not, as a

South Indian Railway Company v. Narayana Aiyyar.

matter of fact, loaded in Tiruppur and that the evidence as to its having been loaded or to its having been found lost at Erode cannot be believed.

4. With the above facts, I shall answer the question remitted to this Court for findings.

5. *On the 1st issue.*—It follows that the bale had been lost on account of the neglect of the Railway Transport Officer. The further question is whether the neglect could be called wilful. When the bale had been consigned, an officer of the Railway Company and by his neglect the bale is not consigned, the neglect cannot but be considered to be wilful, unless there are extenuating circumstances to prove the contrary. In such cases, where the transport has to be done by a Railway Officer, if no explanation is forthcoming as to why the bale had not been loaded, he cannot be exonerated on the ground that the plaintiff has not proved that he (the officer) had wilfully kept it back. All neglect is wilful unless there are circumstances to show that the neglect was due to accident or to circumstances over which the Railway Officer had no control. In the absence of any such extenuating circumstances, I cannot but hold that the non-loading of the bale was due to the wilful neglect of the transport agent. This conclusion is fully supported by the decision reported in 24 Bombay Law Reporter, page 272.

6. *As to the 2nd issue.*—I find it in the negative as the oral evidence is untrustworthy and as the loss could have been proved by very satisfactory documentary evidence in the possession of the Company. It must be noted that no intimation was given of any such loss to the plaintiff promptly and that the theft was suggested by the Company only on 30th August, 1919 though the bale is alleged to have been lost on 2nd April.

7. Then as regards the question whether proper notice had been given to the Company of the claim under S. 77 of the Railways Act, the section only require that notice should be given to the Administration. As a matter of convenience, S. 140 lays down that the notice may be given to the Agent. But it has been held by their Lordships of the Madras High Court, in the Full Bench decision in 45 Madras, 135, that where there have been officers deputed to whom complaints could be made and who could settle the claims, and if it is shown to have reached the responsible officer for the Railway administration, the notice would be sufficient. In the present case, it would be seen that in answer to the letter written by the plaintiff to the District Traffic Superintendent, reply is sent to the plaintiff by the General Traffic Manager for disposal. The consignment receipt Exhibit I (*a*), also shows that the person to whom the plaintiff should complain is the General Traffic Manager. Even in his last reply, the General Traffic Manager refers to the reply he had already sent. It therefore follows that the notice given by the plaintiff had reached the proper officer to whom it should be sent, and I accordingly hold that the notice given by the plaintiff to the District Traffic Superintendent on 19th August is a proper notice as contemplated by S. 77 of the Railways Act.

This petition coming on for final hearing on Thursday, the 1st day of November, 1923, the Court (Waller, J.) delivered the following

Waller, J.

JUDGMENT :—The findings called for have been received. I will deal first with that relating to the claim under S. 77 of the Railways Act. The finding of the Subordinate Judge is

South Indian Railway Company v. Narayana Ayyar

that the notice given by Plaintiff reached the proper officer to whom it should have been sent. The particular notice was, I take it, the letter addressed by plaintiff on 19—8—19 to the District Traffic Superintendent, Trichinopoly (Exhibit D), and replied to by the Deputy Traffic Manager (Freight). It is not quite clear whom the Subordinate Judge considered to be the "proper Officer," but I imagine that he meant by this expression the General Traffic Manager of the Railway. His argument, I understand, is this. Plaintiff's letter to the District Traffic Superintendent was replied to by the General Traffic Manager (as a matter of fact, the reply came from his Deputy) ; the notice sent by plaintift to the Agent was referred by the latter to the General Traffic Manager ; the consignment receipt indicates that consignors should complain to the General Traffic Manager ; therefore, the General Traffic Manager must have been authorized to receive claims under S. 77 and notice to him is a sufficient compliance with S. 140 of the Act.

This finding is based on the Full Bench Ruling in *Mahadeva Aiyar* v. *S. I. Ry. Co.,* (1). As I read that ruling, what two of the three Judges, decided was this, that there should be evidence (1) either that the power of the Agent to receive notices under S. 140 had been delegated to some subordinate officer, who had actually received the notice or (2) that the company by its rules or course of business had held out to the public that notices might be given to such an officer instead of to the agent and thus estopped itself from raising a technical defence.

In this case, I can find no such evidence. The rules of the company have not been produced and there is nothing to show that the Agent has delegated to any of his subordinates his power under S. 140. Nor is there any evidence from which it can be inferred that plaintiff's first claim came to his notice. The circumstances referred to by the Subordinate Judge do not justify the conclusion that the company's course of business has led the public to believe that notice may be given to the District Traffic Superintendent, the Deputy Traffic Manager or the General Traffic Manager instead of to the Agent. Even plaintiff, when he came to issue his formal notice, addressed it to the Agent, when, unfortunately for himself, it was out of time. He cannot, I think, fall back on informal

1. (1921) I L R 45 M 135 : 42 M L J 202 (F B).

South Indian Railway Company v. Narayana Ayyar.

Waller, J.

correspondence between himself and subordinate officers of the Railway at an earlier date.

I think that the Subordinate Judge's finding that plaintiff's letter to the District Traffic Superintendent of 19th August 1919 was a proper notice is supported by no evidence. Nothing has been proved that would bring the case within the Full Bench ruling referred to above. It is not necessary to consider the other findings. The suit is barred. The Revision Petition is allowed with costs throughout.

A. S. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Chinniah *alias* Krishnaswami Naidu *Petitioner** (*1st accused in Bench Cases No. 69 of 1923 on the file of the Court of the First Class Magistrate of Chittoor Town*).

Chinniah *in re*

Madras Act III of 1889, S. 6—Keeping a common gaming house—Gaming house, meaning of.

A common gaming house is one in which a large number of persons are invited habitually to congregate for the purpose of gaming. It does not make any difference for this purpose that the use of the house and the gaming therein are limited to the subscribers and the members of a club, and may not be open to all persons who might be desirous of using the same.

15 Halsbury's Laws of England 217, *Jenkins* v. *Turpin,* 13 Q B D 505 foll. *Srinivasachari and others* v. *Rex,* 1 Weir 917 referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Court of the First Class Bench Magistrate of Chittoor Town in Bench Case No. 69 of 1923.

V. Viswanatha Sastri for the petitioner.

K. N. Ganapathi for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—The offence with which the accused is charged is that of keeping a common gaming house, punishable under S. 6 of Madras Act III of 1889. A common gaming house is defined thus in 15 *Halsbury* 217 " It is one in which a large number of persons are invited habitually to congregate

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*Cr R C No. 382 of 1923.
(Cr R P No. 286 of 1923). 23rd November, 1923.

Chinniah *in re*

for the purpose of gaming." In *Jenkins* v. *Turpin* (1), Hawkins, J., says "Neither do I think it makes any difference that the use of the house and the gaming therein was limited to the subscribers and members of the club, and that it was not open to *all* persons who might be desirous of using the same. If this could be set up as a defence to an indictment, any indictment for keeping a common gaming house might be defeated." I am willing to accept this statement of the law and I do not think that this is at variance with that contained in *Srinivasachari and others* v. *Rex* (2), where the learned Judges, Sir Arthur Collins, C. J. and Parker, J. observe "In the absence of any technical definition the term 'common gaming house' must at least imply that the house was one used as a place of public resort." They do not say what a place of public resort is and, in the circumstances, I am not prepared to hold that the definition given in the Madras case is necessarily opposed to that given in the English case and in Halsbury's Laws of England.

The next question is, has the evidence in this case established that the accused keeps a gaming house in this sense? P. W. 3, a dismissed and disreputable police constable, no doubt says, "The accused is the owner of the house. The accused collects the pool for himself for every 'rung' or 'run' for the use of his house and for the cost of the cards. The accused benefits up to Rs. 12 a day, never less than Rs. 5." It is extremely unsafe to act upon the uncorroborated testimony of a witness of this sort. He admits that he was himself taking part in the game and then turned an informer at the request of the Police. The only independent witness who speaks to the transaction from personal knowledge is P. W. 4 and he hopelessly contradicts P. W. 3. because, according to the former the accused was himself a player and he took money from the pool whenever he happened to be the winner. P. W. 4's station in life is not such as to inspire confidence, and I am not prepared therefore to act upon evidence of this kind and convict the accused.

It is somewhat remarkable that the police should have attempted to prove a case of this nature by such worthless evidence, when, according to them, it is a notorious fact that the accused keeps a common gaming house, several persons have from time to time complained and the gaming house has been kept for about ten years previous to the prosecution.

1. (1882) L R 13 Q B D 505. 2. 1 Weir 917.

In the circumstances I set aside the conviction and direct the fine, if it has been collected, to be refunded to the accused. The order as to confiscation is also set aside.

C. A. S. *Conviction set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

P. Kottoora Thevan and others *Petitioners** (*Accused* 1 *to* 10).

Kottoora Thevan *in re*

Indian Penal Code, Ss. 34, 149 *and* 395—*Dacoity—Unlawful assembly—Rioting—Common intention—Basis of a conviction for dacoity—Necessity for charge and proof that the lawful assembly had common intention of committing dacoity or that each accused knew that dacoity was likely to be committed in pursuance of the common object.*

The only legal jurisdiction for a conviction for dacoity must rest on an application of S. 34 or S. 149 of the Indian Penal Code. For either section to apply it is necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity or that each accused knew the dacoity was likely to be committed in prosecution of the common object of the unlawful assembly.

Where there was no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt for the purpose of of committing theft, no conviction for dacoity by force of S. 34 or S. 149 of the Indian Penal Code can be sustained.

Case taken up under the orders of the Hon'ble Mr. Justice Coleridge, dated 10th April, 1923 and petitions under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Judgment of the Sessions Judge of Tinnevelly in Criminal Appeals Nos. 76 and 79 of 1922, dated 31st March, 1923.

T. Rangachariar and *A. Srirangachariar* for the accused.

V L. Ethiraj for the *Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—Petitioners in this case were convicted before the Assistant Sessions Judge of Tinnevelly by a jury of the offence of dacoity, and by the Assistant Sessions Judge himself of the offences of rioting, and by force of S. 149, Indian Penal Code, causing various kinds of hurt. On appeal, the Sessions Judge reversed the convictions under Ss. 324 and 325, Indian

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*Cr R C No. 278 of 1923
Taken up case No. 18 of 1923.
(Cr R P No. 290 of 1923). 20th November, 1923.

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Penal Code by force of S. 149 and sustained the convictions under Ss. 395, 147 and 323, Indian Penal Code. Petitioners contend that there was no legal material on which a conviction under S. 395, Indian Penal Code, can be sustained.

The facts, which before us as a Court of revision may not be traversed, are that an unlawful assembly of which petitioners are said to have been members, attacked the Adi-Dravida village of Ilavankulam with the common object of committing mischief to the properties of the residents and hurt to their persons, that mischief and hurt were so caused and that in the course of this outrage, various articles of property belonging to various inhabitants were carried off by persons in the mob.

Now there is no evidence that any such article was carried off by 5 or more persons, or that 5 or more persons invaded any house, caused hurt to the inmates *for the purpose of committing theft* there, and carried off articles therefrom. The only evidence that we can find of theft of articles from a house or person, accompanied by the use of hurt or violence to the inhabitants of the house or to that person is as follows :—Prosecution 7th witness says that accused 5, 6 and 10 beat him with sticks, and then entered his house and looted it, and prosecution 10th witness says that 9th accused beat him with a stick and then stole vessels from his house. In neither case is there any evidence that 5 or more persons joined in these robberies.

Prima facie then there is no evidence that any dacoity was committed. The only legal justification for a conviction for dacoity must rest on an application of S. 34 or S. 149, I. P. Code. For either section to apply, it was necessary to charge and prove that the unlawful assembly as a whole had the common intention of committing dacoity or that each accused knew that dacoity was likely to be committed in prosecution of the common object of the unlawful assembly. No charge in such tenour was framed against accused, nor were they called upon to defend themselves on such a count. In the charge framed they were no doubt called upon to defend themselves, *inter alia,* against the charge of being members of an unlawful assembly, whose common object was to commit mischief and cause hurt. But there was no count in the charge that the common object of the unlawful assembly was to commit dacoity, or to cause hurt *for the purpose of committing theft,* without which no conviction for dacoity by force of

S. 34 or S. 149, I. P. Code, can be sustained. Again, no doubt, all the accused were charged substantively with the offence of "dacoity by robbing Sankarapandyan and others," but, as we have pointed out, there is no evidence that any or all the accused directly committed dacoity.

The conviction for dacoity, based either on a finding of a common object not charged, or on evidence which does not prove the essential ingredients of the offence, cannot be sustained. The learned Assistant Sessions Judge therefore misdirected the jury and should have directed them that a conviction for dacoity could not be sustained on the charge and the evidence. We must, therefore, as this is a case of an illegal conviction, interfere in revision and set aside the conviction of the petitioners for dacoity.

There is evidence, however, that accused 1, 2, 3 and 9 committed theft (Prosecution 5th witness), that accused 5, 6 and 10 committed robbery (Prosecution 7th witness) and that 9th accused committed robbery (Prosecuion 10th witness). As they have been charged with dacoity, they may be convicted of these lesser offences of the same kind. We therefore convict accused 5, 6, 9 and 10 of the offence of robbery under S. 392, I. P. Code and accused 1, 2 and 3 of the offence of theft under S. 379, I. P. Code.

As to the sentences, the method of the Assistant Sessions Judge of passing one consolidated sentence for all offences is not a happy one, and leads to complications, as we now find. We do not know what sentence he intended to inflict for the offence of dacoity, considering that dacoity was one of the offences which he found proved, the sentences were extremely lenient. Though we hold that no dacoity was proved to have been committed, we agree with the lower Courts that a very serious and concerted attack was made on these unfortunate villagers. We do not find ourselves inclined to reduce the sentences by much. In the case of accused 4, 7 and 8 now acquitted of dacoity and kindred offences, we reduce the sentences by six months. In the case of accused 1, 2, 3, 5, 6, 9 and 10, now acquitted of dacoity but convicted of robbery or theft, as above, we reduce the sentence by 3 months. The lower appellate Court's order under S. 106, Cr. P. Code, will stand.

C. A. S. *Sentences reduced.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Sankaranarayana Pillai and others.. *Appellants** (*Defendants Nos.* 4 *to* 10, 14 *to* 16, 20, 22, 23, 27, 29, 32, 42, 47 *and L. R. of* 26*th defendant*)

v.

Rajamani *alias* Guruswami Nadar and others *Respondents* (*Plaintiffs* 1 *to* 4, *Defendants* 1 *to* 3, 17, 48 and *nil*).

Sankara-narayana Pillai *v.* Rajamani

Provincial Insolvency Act of 1907, *S.* 18 (1)—*Receiver—Order appointing and vesting property in him—What amounts to—Official Receiver acting as agent of Court—Sale of property by—Validity—Ratification by Court—Effect—Hindu Law—Joint family—Father and minor son—Adjudication of—Validity as regards minor son—Sale of family property by Official Receiver—Interest of minor son if and when passes under—Receiver professing to act as assignee of father and of minor son, but purporting to convey entire property—Effect—Deed—Construction.*

Defendants 1 and 2 and 3rd defendant, who were carrying on business together, were adjudicated insolvents. At the same time, the plaintiffs, who were the sons of defendants 1 and 2, and who were made parties to the insolvency petition, were also adjudicated. The order of the District Judge on the insolvency petition was :—Petitioner 1 examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings.—The family properties of defendants 1 and 2 were sold by the Official Receiver, the sale deeds showing that the Official Receiver purported to convey his entire interest in the properties. The deeds further showed that the Official Receiver professed to act as the assignee of the adult as well as the minor insolvents and that he did not purport to exercise the power possessed by a Hindu father to dispose of his son's interest for causes which are recognised as just and proper.

In a suit brought by the plaintiffs to recover their 4|9ths share in the properties sold by the Official Receiver on the grounds (1) that, as they were minors at the time, their adjudication was illegal, the Official Receiver had no authority to sell their shares, and his sale of the properties was therefore void as against them ; and (2) that the property of the insolvents did not vest in the Official Receiver, *held,* (1) that the order on the insolvency petition, by implication, appointed the Official Receiver, the Receiver for the property of the insolvents and vested the property in him ; (2) that, even otherwise, the property of the insolvent vested in the Court, the Official Receiver could have acted as its agent, and, as his proceedings were ratified by the Court, the sales effected by him were valid ; (3) that, on the insolvency of defendants 1 and 2, their right to dispose of their son's interest in ancestral immoveable property for the payment of their debts not tainted with illegality or immorality vested in the Official Receiver ; and (4) that, even if the adjudication of the minor plaintiffs as insolvents was illegal, the sales by the Official Receiver must, on the autho-

*Appeals Nos. 216 and 272 of 1921. 21st November, 1923.

Sankara-narayana Pillai v. Rajamani

rity of the decisions in 42 C 56 and 25 A 407, be held to have passed the entire properties sold, including the interest of the minor plaintiffs therein.

Appeals against the decree of the Court of the Additional Subordinate Judge of Tinnevelly in O. S. No. 9 of 1920 (O. S. No. 47 of 1919 on the file of the Sub-Court, Tinnevelly).

T. R. Venkatarama Sastri and *T. L. Venkatarama Aiyar* for appellants in A. S. No. 216 of 1921.

A. Krishnaswami Aiyar for respondents.

K. Rajah Aiyar and *P. V Krishnaswami Aiyar* for appellants in A. S. No. 272 of 1921.

A. Krishnaswami Aiyar and *K. V Sesha Aiyangar* for respondents.

The Court delivered the following

JUDGMENTS :—*Phillips, J.*,:—The plaintiffs in this suit are the sons of defendants 1 and 2 and in 1912, defendants 1 and 2 and 3rd defendant who were carrying on business together were adjudicated insolvents, and at the same time the plaintiffs who were made parties to the insolvency petition were also adjudicated. The family properties of defendants 1 and 2 were sold by the Official Receiver and now the plaintiffs bring this suit to recover their 4|9ths share in that property on the ground that they were wrongly adjudicated insolvents and that consequently, the sale of their property by the Official Receiver was void as against them.

Phillips, J.

Assuming that the plaintiffs who were then minors were wrongly adjudicated insolvents, the question remains whether the sales effected by the Official Receiver did or did not pass their interest in the family property.

The sale is objected to on two grounds, firstly, that the Official Receiver purported to sell the share of the plaintiffs and, not having authority to do so as their adjudication was illegal, the property did not pass ; and, secondly, it is contended that the property of the insolvents did not vest in the Official Receiver. The Subordinate Judge has decided the second point against the plaintiffs but has found on the first point that the Official Receiver purported to sell the plaintiffs' share as well as the shares of their fathers, defendants 1 and 2, and that, as he had no right to sell the minors' shares, the same is not binding upon them. On referring to the sale deeds Exhibits XVI, XXII, XXVIII, XXX, etc., we find that the Official Receiver sold the properties belonging to defendants 1 to 3 and the plaintiffs. In several of the sale deeds there is also a recital that these persons had all been adjudicated insolvents,

Sankaranarayana Pillai v. Rajamani — Phillips, J.

and it is these documents that the Subordinate Judge has interpreted as constituting a sale of the minors' rights in the property separately from the rights of those legally adjudicated insolvents. The appellants, however, rely on two cases decided by the Privy Council, namely *Bijraj Neopani* v. *Pura Sundary Dasee* (1) and *Gharibulla* v. *Khalak Singh* (2). The former was a case of a sale wherein the vendor purported to sell certain property as the beneficial owner. As a matter of fact, he was not entitled to the property as beneficial owner, but, as an executor, he had full title to the property and it was held that, inasmuch as he purported to pass the whole of the property and had power to do so as executor, the title passed, it being held that "the plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution." Applying this principle to the present case, we find that the Official Receiver had power to sell not only the share of the adult insolvents but had also vested in him the power of these insolvents as fathers to sell their sons' interest in the property for the payment of antecedent debts. The Official Receiver had ,therefore, power to sell the shares of the plaintiffs as well as of the fathers. The recital in the deed is that the property belonging to all the members of the family is sold and there is no specific recital that the shares of the various persons are sold separately. It is, therefore, difficult to read into the document any intention to sell the shares separately, and, in accordance with the principle of *Bijraj Neopani* v. *Pura Sundary Dasee* (1) it must be held that the property which purported to be sold and which actually was vested in the Official Receiver would pass to the vendees, and that property includes the shares of the sons. The second case *Gharibullah* v. *Khalak Singh* (2) is a case where the manager of a family mortgaged, in conjunction with another major member of the family and a minor represented by his mother as guardian, the whole family property. Although it was held that the mother as guardian of the minor could not make a mortgage of the minors' property without the sanction of the Court which was not obtained, it was held that the managing member had power to sell the whole property for the benefit of the family, and that, therefore, the whole of the property passed. Here again although the minor's interest purport-

1. (1914) I L R 43 C 56 : 27 M L J 93 (P C). 2. (1903) ILR 25 A 407 (P C).

Sankara-narayana Pillai v. Rajamani

Phillips, J.

ed to be conveyed, and the minor through his guardian was a party to the document yet as the manager had the right to dispose of the minor's interest also, the minor's interest was deemed to have been mortgaged. On the authority of these two decisions, I think it is clear that the sale deeds executed by the Official Receiver had the effect of passing the interest of the minors but it is argued for the respondents that there are other cases of the Privy Council which take a contrary view, namely, *Balwant Singh* v. *R. Clancy* (3) and *Ganesh Rao* v. *Tulja-ram Rao* (4), but both these cases are distinguishable. In the former case there was a specific statement in the sale deeds that the vendor was the only sharer in the property and he did not in any way purport to dispose of the rights of his brother who was subsequently found to be entitled to a share. The document was explicit and referred only to the interest of the actual vendor. In the second case a father and his son entered into a compromise of a suit, the father purporting to act as guardian of the son. It was there held that, as the father had not obtained the permission of the Court to enter into the compromise the compromise was not binding on the son, and the plea that the father could have entered into the compromise in his personal capacity and thereby made it binding on his minor son was not accepted, although the case in which the minor is represented by some other person as guardian was expressly left open, possibly with reference to the decision in *Gharibullah* v. *Khalak Singh* (2). On the ground therefore that the compromise was entered into by the father not only on his own behalf but on behalf of his son, and that he had not obtained the permission of the Court, the compromise was held not to be binding under S. 462 C. P. C. I am, therefore of opinion that the sales by the Official Receiver which purported to sell the whole property belonging to the family had the effect of passing the whole property, for the right of disposing of the whole property had become vested in the Official Receiver, and he must be deemed to have sold that right. I may also refer to two decisions of this Court in support of this conclusion *Surappa Raju* v. *Venkayya* (5) and *Rajagopalan* v. *Subbarama Iyer* (6). Another case relied on by the appellants *Sabapathy Chetty* v. *Ponnuswami Chetty* (7) is apparently in con-

2. (1903) I L R 25 A 407 (P C). 3. (1912) I L R 34 A 296 : 23 M L J 18 (P C).
4. (1913) I L R 36 M 295 : 25 M L J 150 (P C). 5. (1915) M W N 908.
6. (1919) M W N 356. 7. (1915) 28 I C 365.

Sankaranarayana Pillai v. Rajamani

Phillips, J.

flict with the Privy Council decision in *Balwant Singh* v. *R. Clancy* (3), but it is unnecessary to discuss that question here. It has been repeatedly decided that the power of a father to dispose of his sons' share does vest in the Official Receiver, when the father becomes insolvent, and there was nothing in Mr. Krishnaswami Iyer's argument of sufficient force to induce me to re-open the question. In view of this finding, the plaintiff's suit would have to be dismissed; but Mr. A. Krishnaswami Iyer seeks to support the decree on the ground that the decision of the Subordinate Judge that the property of the insolvents had become vested in the Official Receiver is wrong. The order of the District Judge on the insolvency petition was as follows—Petitioner examined. No opposition. Adjudication order passed. Referred to Official Receiver for further proceedings * * * * * It is now contended that this order does not amount to the appointment of a receiver under S. 18 (1) of the Provincial Insolvency Act and that, consequently, the property did not vest in the Official Receiver. That section runs as follows " The Court may at the time of the order of adjudication, or at any time afterwards, appoint a receiver for the property of the insolvent, and such property shall thereupon vest in such receiver." It has been held in several cases in this Court that an appointment order is necessary and that the property does not vest in the Official Receiver without such order, but I would hold that even if this proposition is conceded it does not help the respondents because there is an order of appointment in this case. Under S. 19 (1) " the Local Government may appoint such persons as it thinks fit (to be called Official Receiver) to be receivers under this Act." In the present case such a receiver had been appointed by the Local Government for the District of Tinnevelly and it appears to me that the Court, having passed an order of adjudication and referred the insolvency petition to the Official Receiver for further proceedings, must have intended to appoint and be deemed to have appointed the gentleman called " Official Receiver" as the receiver in this particular insolvency. I am not prepared to hold, as contended by Mr. Krishnaswami Iyer, that the proceedings in the District Judge's order must be read as meaning judicial proceedings only, his argument being that the reference was merely a reference to the Official Receiver to exercise the powers which could be delegated to him under S. 52 of the Act. No such limitation is found in

3. (1912) I L R 34 A 296 23 M L J 18 (P C).

Sankaranarayana Pillai v. Rajamani

Phillips, J.

the order itself and therefore the order " Referred for further proceedings " is only intelligible in the view that the case was referred to the person who had been appointed receiver under the Act, with the intention that he should act as receiver in this particular case and the order amounts to an order of appointment. It is quite clear that the Court, the Official Receiver and all the parties acted under the impression that a receiver had been appointed and that the insolvents' property vested in him. This order was in 1912 and even when this suit was brought in 1918, it was recited in the plaint that the property vested in the Official Receiver, and it was only during the course of the trial that the question was raised by the plaintiffs apparently upon a perusal of the order of the District Judge and of a subsequent formal order passed by him in 1916 appointing the Official Receiver for the property of the insolvents in this case. This subsequent order was not passed by the same Judge who passed the original order and cannot affect in any way the meaning of the former order. The cases relied upon, namely, *Official Receiver of Trichinopoly* v. *Soma-Sundaram Chettiar* (8), *Muthuswami Swamiar* v. *Somo Kandiar* (9) and *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (10) are cases in which no order of appointment had been made. The petitions of the insolvents having been sent to the Official Receiver before adjudication, such an order passed before adjudication could hardly be interpreted as an order passed at the time, or after adjudication, under S. 18 (1). Those cases are therefore, of little value in the present case in the view that I take of the District Judge's order of 1912 which was passed at the time of adjudication. There is another case reported in *Subba Iyer* v. *Ramaswami Iyengar* (11) in which it was held that, although there had been no order appointing a receiver, yet the acts done by the Official Receiver in administering the estate would be deemed to be acts done as agent of the Court, such acts being subsequently ratified and, therefore, valid. It is suggested that the decision in *Subba Iyer* v. *Ramawsmai Iyengar* (11) is not right, because at the time the order of agency was passed property had not vested in the Court ; but whether or not this is a valid objection the same objection cannot be taken in the present case because by the order of adjudication the property became vested in the Court. Accepting this case as an authority for the proposition

8. (1916) 30 M L J 415. 9. (1920) I L R 43 M 869 : 39 M L J 438.
10. (1921) 41 M L J 78. 11. (1921) I L R 44 M 547 : 40 M L J 207.

Sankaranarayana Pillai v. Rajamani

Phillips, J.

that the Official Receiver could act as agent, it is clear that the subsequent ratification by the Court would make the proceedings valid. I would, therefore, hold that the property of the major insolvents was vested in the Official Receiver at the date of sale and, consequently, the sales are effective either as acts of the Receiver properly appointed, or as the agent of the Court.

Several other pleas were raised by the plaintiffs, such as the immoral nature of the debts incurred by their fathers, the fraud practised by the Official Receiver in administering the estate, and collusion between him and the creditors. These points have been found against the plaintiff in the lower Court although there are several remarks in the Judgment which go to show that the learned Subordinate Judge thought that there was a good deal of force in the contentions but it is now conceded by Mr. Krishnaswami Aiyar that he can point to nothing in the evidence to substantiate these pleas of immorality or fraud. I may add that the fraud was not specifically pleaded, nor was an issue taken thereupon, and it would hardly be fair to allow fraud to be proved without specific allegation thereof.

As a result of the above, the appeals are allowed and the plaintiff's suit dismissed with costs throughout.

Venkatasubba Rao

Venkatasubba Rao, J. :—I agree.

Mr. T. R. Venkatarama Sastri, the learned Vakil for the appellant, assumed without admitting that the adjudication of the minor plaintiffs as insolvents was illegal, and the appeal was argued on this footing. The first question that arises is under the conveyances from the Official Assignee does the entire property pass to the alienees or does the interest only of the adult co-parceners pass ? The learned Sub-Judge has found that the debts of the 1st and 2nd defendants were not incurred for illegal or immoral purposes and it is now a settled rule that the Official Receiver can exercise the right of the father to dispose of the sons' interest in ancestral immoveable estate for the payment of the father's debts not tainted with illegality or immorality. The sale deeds filed in the case show that the Official Receiver purported to convey his entire interest in the properties in question. It is no doubt true that he professesd to act as the assignee of the adult as well as the minor insolvents and that he did not purport to exercise the power possessed by a Hindu father to dispose of his sons' interest, for causes which are recognised as just and proper.

Sankara-narayana Pillai v. Rajamani — Venkata-subba Row, J.

But all the same, I think in the circumstances the alienees acquired the right and title of the Official Receiver which he possessed in every capacity.

In *Bijraj Neopani* v. *Pura Sundary Dasee* (1) it was held that the title vested in an executor passed under the deed by which he purported to convey all his right and title in the property sold although he did not expressly state in it, that he was conveying the property in his capacity as executor. Their Lordships observe "The deeds state plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense."

This principle was also recognised in *Gharibullah* v. *Khalak Singh* (2). One of the three brothers constituting an undivided Mitakshara family was a minor, and his mother as his guardian executed the mortgage deed along with the two adult brothers. It was found that the mother was incompetent to act as the minor's guardian but their Lordships held that the mortgage must be considered to be a mortgage by the family entered into by its Karta and could, so far as the mortgage was found to have been made for the benefit of the family and for legal necessity, be enforced against all the members.

The true principle deducible from these cases seems to be this. The first question that arises is did the executant purport to pass the whole property ? The next question is was he in a position to validly convey it ? If the two questions are answered in the affirmative, the third question arises is there anything in the deed to repel the presumption that he intended to convey the title he possessed in every capacity ? Judged by this test there can be no doubt that the alienees before us acquired the interest of the fathers as well as of the sons in the properties conveyed by the Official Receiver.

Mr. Alladi Krishnaswami Aiyar, the learned Vakil for the respondent, contended that the interest of the sons did not pass and relied upon *Balwant Singh* v. *R. Clancy* (3). The ancestral family in that case consisted of Sheoraj Singh and Maharaj Singh. The former was the sole mortgagor and by the deed of mortgage, after declaring that he was the absolute owner and that there was no sharer in the property, he pur-

1. (1914) I L R 42 C 56 (P C). 2. (1902) I L R 25 A 407 (P C).
3. (1914) I L R 34 A 296 (P C.)

Sankaranarayana Pillai v. Rajamani — Venkatasubba Row, J.

ported to mortgage it. Maharaj Singh was not a mortgagor and he was made a party to the deed in order that the fact of his having signed it might afford evidence that he had assented to the taking of the loan and the granting of the mortgage by Sheoraj Singh. Their Lordships found as a fact that Maharaj Singh was a minor on the date of the mortgage and held that as the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh the mortgage deed did not affect the latter, or his interest in the estate.

This decision is not opposed to the two cases already cited for in it the essential elements I have referred to are wanting. Sheoraj Singh obtained the loan in his assumed position of the absolute owner of the estate and not as the manager of the joint Hindu family. There was an implied denial by him of his possessing any capacity which is consistent with the recognition of the minor's title and while he denied the minor's right he could not be held to have conveyed the estate on behalf of the minor. In the circumstances it was unnecessary to find whether Sheoraj Singh was in a position to validly convey the property and accordingly although the High Court gave a finding that he was not, the Judicial Committee did not consider it necessary to deal with that question.

I am of opinion that the present case comes within the principle enunciated and acted upon in *Bijraj Neopani v. Pura Sundary Dasee* (1) and *Gharibulla* v. *Khalak Singh* (2) and that our decision on this point must therefore be in favour of the appellant.

I now proceed to deal with the next argument of Mr. A. Krishnaswami Iyer that the properties did not vest in the Official Receiver. S. 18 (1) of the Provincial Insolvency Act III of 1907 runs thus—" The Court may at the time of the order of adjudication, or any time afterwards, appoint a receiver for the property of the Insolvent, and such property shall thereupon vest in such receiver. " On the 29th November 1922, the District Judge made the following order ; " Adjudication order passed. Referred to Official Receiver for further proceedings." The argument is that the Court did not appoint a receiver for the property of the insolvent and that therefore it did not vest in the receiver. I do not think this argument is sound. No set form of words is prescribed to make the appointment of Receiver. In this case the order directs

1. (1914) I L R 42 C 56 (P C.) 2. (1902) I L R 25 A 407 (P. C.)

Sankara-narayana Pillai v. Rajamani — Venkatasubba Row, J

the Official Receiver to take further proceedings. S. 20 of the Act sets out some of the proceedings he was to take. It says that the Receiver shall realise the property of the debtor and for that purpose may perform certain acts. These proceedings the Official Receiver could not take unless he was the receiver of the estate. The order by implication, therefore appoints the Official Receiver, the Receiver for the property of the insolvent. The parties, the Court, the Receiver himself and strangers to the estate, understood the order in this sense. That the plaintiffs also understood it in the same way is apparent from their plaint. Mr. Krishnaswami Aiyar contends that the word " proceedings " means " Judicial Proceedings " and that the order is to be construed as directing the Receiver to exercise the jurisdiction delegated to him under S. 52 of the Act. But I am unable to accede to this contention. The word Proceedings " does not occur in S. 52 whereas it occurs in S. 20, and in the latter section the proceedings contemplated have reference to the administration of the insolvents' estate. This being my construction of the order in question, the cases relied upon by the learned Vakil, namely, *Official Receiver, Trichinopoly* v. *Somasundaram Chettiar* (8), *Muthuswami Swamiar* v. *Somoo Kandiar* (9), *Vythilinga Padayachi* v. *Ponnuswami Padayachi* (10) and *Kavali Sankara Rao* v. *Ramakrishnayya* (12) are distinguishable.

There is yet another ground on which the sales by the Official Receiver may be upheld. Under S. 16 (2) (*a*) on the making of an order of adjudication the property of the insolvents vests in the Court and under S. 23 where no Receiver is appointed the Court has the rights of a Receiver. S. 20 provides that the Receiver shall realise the property of the debtor and for that purpose may sell any property of the insolvent. Cl. (*e*) of the same section says that the Receiver may appoint an agent to take any proceedings. Reading the order in question in the light of the above sections, it is obvious that in any event the Official Receiver was empowered by the Court as its agent to sell the properties, and the sales effected by him are valid in this view. This was in effect what was held in *Subba Iyer* v. *Ramaswami Iyengar* (11) and I am prepared to follow it. On this point also, therefore, the respondent fails.

8. (1916) 30 M L J 415.
9. (1921) I L R 43 M 869.
10. (1921) 41 M L J 78.
12. (1923) 46 M L J 184.
11. (1921) I L R 44 M 547 : 40 M L J 207.

Sankara-narayana Pillai v. Rajamani

In the result I agree with the order proposed by my learned brother.

By the Court :—The memorandum of objections in Appeal No. 216 of 1921 is dismissed. There will be no costs.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

Bharata Iyer *Petitioner* (Respondent).*

Bharata Iyer *In re.*

Criminal Procedure Code, S. 488 — Order for maintenance — Offspring of a Sammandham — Righ to maintenance against the father.

Although the offspring of a sammandham are not entitled to an order for maintenance against their father in case the tavazhi or tarward has sufficient means to maintain them, where the tarwad is not in a position to maintain them without an allowance from their father, an order for maintenance may be passed against him under S. 488 of the Criminal Procedure Code.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order of the Court of the Sub-Divisional Magistrate of Malapuram, dated 27th October, 1923 in M. C. No. 12 of 1923.

N. R. Sesha Aiyar for the petitioner.

The Court made the following

ORDER :—This is an application to revise the order of the Sub-Divisional Magistrate of Malapuram made under S. 488, Cr. P. Code wherein he ordered the petitioner to pay a monthly allowance of Rs. 4 for the maintenance of the child of the respondent, a Nair woman, the petitioner being a Brahmin. The petitioner denied the sammandam and disowned the paternity of the child. The learned Magistrate however observed that his vakil did not press this point seriously either in the cross-examination of the prosecution witnesses or in his own defence, and has come to the finding that the paternity of the child is proved. The main point relied upon before the lower court was that the woman was in a position to maintain the child and therefore the father was not liable to maintain it. Mr. N. R. Sesha Iyer before me has taken the same point and relies on two decisions of this Court, namely, *Chantan* v. *Mathu* (1) and *Parrappath Chinna* v. *Sankuni Menon* (2). In the former case it was held that a child that possesses a

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*Cr. R. C. No. 913 of 1923.
(Cr. R. P. No. 731 of 1923) 13th December 1923.

1. (1919) I L R 39 M 957. 2. (1919) 37 M L J 361.

Bharata Iyer *In re.*

right to maintenance from its mother's tavazhi is not entitled to an order for maintenance against its father. It was also held that the words "unable to maintain" are not confined to physical inability but include also pecuniary inability. Abdur Rahim, J., in that case said I think the ability contemplated by the section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case by some other person as to a child which is able to earn a living by its own exertions." In the later case in *Parrappath Chinna* v. *Sankunni Menon* (2) to which Ayling, J., was also a party as in the earlier case which was followed, the learned Judges say that the offspring of a sammandham are entitled to maintenance from their tavazhi, and if the tavazhi or tarwad has sufficient means to maintain them, they are not entitled to an order for maintenance against their father. And the reason which prompted the learned Judges there to revise the order of the Magistrate was that the lower Court had not found what the income of the tavazhi was, nor had it given any findings as to the income of the tarwad. In this case the learned Magistrate has found as a fact that the respondent's tarwad is not in a position to maintain the child without an allowance from the petitioner. Sitting here in revision I am bound by that finding of fact. I must therefore dismiss this Criminal Revision Case.

C. A. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS.

P. C. Perumal *alias Chellaperumal* . *Petitioner** (*Accused in C. C. No. 668 of 1922 on the file of the Town Second Class Magistrate of Trichinopoly.*)

Perumal *In re.*

Criminal Procedure Code, Act V of 1898, S. 540—Power of Court to summon Court witness—Existence of wide powers under the section—Discretion of the Court.

The terms of S. 540 of the Criminal Procedure Code are very wide, and any Court may at any stage of any inquiry, trial or other proceeding summon any person as a witness, if his evidence appears to it essential to the just decision of the case. In acting under the provisions of that Section, the Court has to exercise a proper discretion.

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2. (1919) 37 M L J 361.

*Cr. R. C. No. 508 of 1923.
(Cr. R. P. No. 400 of 1923.) 13th December 1923.

Perumal *In re.*

Petition under Ss. 435 and 439 of the Code of Criminal Procedure 1898 praying the High Court to revise the judgment of the Court of the Sub-Divisional Magistrate of Trichinopoly in Criminal Appeal No. 1 of 1923 preferred against the judgment of the Court of the Town Second Class Magistrate of Trichinopoly in C. C. No. 668 of 1922.

S. Subramania Iyer and *A. S. Srinivasa Iyer* for the petitioner.

V. L. Ethiraj for *the Public Prosecutor* on behalf of the Crown.

The Court made the following

ORDER :—In this case the accused was charged under Ss. 342, 323 and 379 I. P. C. in that at about 5 O' clock on the evening of the 18th November 1922 he bound the complainant to a tree, snatched away his loin cloth and the towel he had on the upper part of his body and the two rupees that he had in the folds of his loin cloth. He was acquitted under S. 379 but convicted under Ss. 342 and 323. The conviction was upheld by the Sub-Divisional Magistrate. Mr. S. Subramania Iyer for the accused presents three points for consideration. He says first that there is good and sufficient alibi evidence that the accused who was employed as a Building Sub-Inspector in the Loco Scheme, Golden Rock, S. I. Ry. Trichinopoly was at work there on that day and not at the place where the offence is said to have been committed which is agreed to be 7 miles distant. The second point is that the Court improperly called a Court witness after the case of each side had been closed; and the third point is that the Court had no jurisdiction to try the case at all as the offence really amounted to robbery and, therefore was only cognizable by a first class Magistrate.

With regard to the first point the first Court disbelieved the *alibi* evidence, and the lower appellate Court says "The Lower Court also disbelieved the *alibi* evidence of defence witnesses 1, 2 and 4 as the appellant did not mention a word about it in his long statement" and proceeds to confirm the conviction. I have allowed the learned Vakil, as I thought it was a case which needed some examination, to take me through the evidence of the *alibi* witnesses.. The first *alibi* witness D. W. 1 says that the accused was at the work spot in the office until 5 p. m., on the day in question. He and the accused apparently left the work together and went to Trichinopoly junction by train together. He is a fellow workman with the accused.

Perumal *In re.*

He and the accused work in one and the same section under the Sub-Divisional Officer, and the head Draftsman in the witness's office is the maternal uncle of the accused. Further the witness states from memory and not from any official record that the accused worked with him until 5 p. m. on the 18th November. I am not prepared to say that this witness can be trusted to establish the *alibi* of the accused To begin with he is indirectly interested and again he only relies on his memory. With regard to D. W. 2 he first stated that he did not know where the accused was working on the 18th November. However, he speaks to his having met the accused on the Golden Rock platform at 5-30 that evening. This man is a draftsman. Although his office does not work on a penultimate Saturday, he says he specially worked on the 18th November, though there is no record to show that he did. I cannot believe his man in any way. D. W. 3 was not relied on by Mr. Subramania Iyer because he says that no such occurrence as is charged occurred at all. I am not prepared to believe that. D. W. 4 produces a diary of the accused. He is a clerk in the Railway Executive Engineer's office. The diary was made up on the 22nd November and the complaint was made on the 18th. The diary is made up by the accused himself, and I must say I am unable to rely on that in any shape or form. I am of opinion that the *alibi* evidence was sufficiently considered by the lower Court ; and having considered it myself, I find it does not establish an *alibi* in favour of the accused.

With regard to the second point, the Court witness was called under S. 540 Criminal Procedure Code, when both the prosecution and the defence evidence had been closed. But neither the prosecution nor the defence had called Kambarasampettai Perimana Muthiriyan who is mentioned as 2nd witness in the complaint of Nachiar Ammal, who is the boy's (complainant's) mother. It is true that this witness is not mentioned in the list put in by the Police in the charge-sheet which contain the names of 7 witnesses of whom 5 were called. The Magistrate, acting under S. 540, the terms of which are extremely wide, called him as a Court witness and apparently relied on his evidence. Two cases are quoted for the defence to show that this witness ought not to have been called. The first is *Empress of India* v. *Kaliprosonno Doss* (1) where a single Judge of the Calcutta High Court refused to exercise

1. (1896) I L R 14 C 245.

Perumal In re.

his powers under S. 540 on the ground that there was no matter necessitating enquiry or question to be cleared up and the witness proposed to be called was not one on whose testimony the Court could place confidence. Here the Magistrate, apparently thought there was a matter to be cleared up as it appeared that this witness could corroborate the prosecution witness as to the occurrence on the 18th November. The other case quoted, I may state that no Madras case has been quoted, was *Natabar Ghose* v. *Adya Nath Biswas* (2). That was a case of very special circumstances. There was a protracted hearing by the Special Deputy Magistrate lasting for about 10 months and after, the case had been posted for judgment two witnesses were examined before the Magistrate under S. 540. I consider that that was an exceptional case, and although it is true that proper discretion has to be exercised under S. 540, still the terms of the section are extremely wide and any Court may at any stage of any enquiry, trial, or other proceeding, summon any person as a witness if his evidence appears to it essential to the just decision of the case. There is no ground for assuming here that the Magistrate did not think that the evidence of this man might be of importance one way or the other either to support the prosecution or to destroy the presecution theory.

The third point is that there was no theft but robbery. I am quite unable to accede to this proposition. The Magistrate has found that the reason why the boy was tied up was to punish him for having thrown stones in the street. It is quite unreasonable to suppose that the accused meant to rob the boy of his cloth and two rupees. It is quite unnecessary that a man should have to tie up a small boy in order to take his cloth from him ; so that the object of tying up the boy was not theft at all. Therefore, the offence of robbery was not committed. The boy was tied up to punish him and then the cloth was taken away from him to put him to shame and two rupees were found in the cloth. It has been found that the accused did not take the two rupees. In fact the accused was not guilty of theft at all. I find these three points against the petitioner and dismiss the Criminal Revision case.

C. A. S. *Petition dismissed.*

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2. (1922) 37 C L J 415 : 27 C W N 675.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

C. Adimoola Mudaliar *Petitioner** (*Auction-purchaser; Counter-petitioner*)

v.

N. C. Manicka Mudaliar *Respondent* (*Defaulter-petitioner*).

Adimoola Mudaliar *v.* Manicka Mudaliar.

Madras Estates Land Act, S. 131—Requisition by petitioner to Court as to balance of amount payable by him—Payment of a smaller amount under information by the office—Payment of balance after the expiry of the time limited under a notice of Court—Delay caused by an act of Court—Delay excused.

An application under S. 131 of the Madras Estates Land Act to set aside a rent sale was made in time and a sum of money was deposited in the Court of the Deputy Collector at the time of making the application. The petitioner was asked to come on a later day for the purpose of ascertaining the balance to be deposited by him. On that day the petitioner came and wanted to know how much he was to pay. The Deputy Collector endorsed on his application "Find out how much he has to pay" and sent it to the office and another sum was paid on that day in consequence of information by the office. Nothing further was done till the necessary balance was paid after the expiry of one month after the sale in pursuance of a notice from the Deputy Collector.

Held, that in the case, the delay of the petitioner in paying the balance was due to an act of the Court misleading the petitioner and the delay should be excused.

I. L. R. 25 C 216 and 25 C 609 applied.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the orders of the Court of the Deputy Collector of Tiruvallur dated 27th July, 1922 in M. P. Nos. 130, 132 and 133 of 1922.

T R. Ramachandra Aiyar and *S. Krishnamachariar* for petitioner.

S. Varadachariar for *S. Gopalaswami Aiyangar, S. Rangachariar* and *V Subramania Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—These petitions arise out of applications filed before the Deputy Collector under S. 131 of the Estates Land Act for setting aside the sales for arrears of rent. The sales were on the 13th of March, 1922. On the 6th of April an application was put in for the purpose of setting aside the sale on the ground of irregularity. The Deputy Collector, probably being under the impression that no application would lie to set aside the sale on the ground of irregularity, advised

*C R P Nos. 783, 893 and 894 of 1922. 23rd November, 1923.

Adimoola Mudaliar v. Manicka Mudaliar.

that the petition may, if so inclined, apply to set aside the sale under S. 131 of the Estates Land Act which corresponds to O. 21, R. 89, C. P. C. An application was put in for that purpose and a sum of Rs. 150 was deposited at the time. The petitioner was asked to come on the 10th of April for the purpose of ascertaining the balance to be deposited. On the 10th of April, it appears from the record, that the petitioner appeared and wanted to know how much he was to pay. The Deputy Collector endorsed on his application "Find out how much he has to pay" and sent it to the office, and Rs. 15-8-0 was received on that day. Having paid Rs. 15-8-0 the Petitioner went away and did nothing further. On the 20th of April the purchaser who was himself the Izaradar applied to the Court for payment of the money paid in by him as purchase-money and in his petition he states that he is informed that the judgment-debtor paid into Court the decree-amount with 5 per cent and poundage and applied for getting rid of the sale under S. 131 of the Estates Land Act, that he has no objection to the sale being set aside ; and he applied for payment of the money to him. Apparently no notice was taken of this application and on the 2nd of June a notice was sent by Mr. Krishnamachariar, a Vakil of the High Court, to the Deputy Collector wherein the application made by his client on the 20th of April 1922 for payment of the money due to him was referred to. The notice proceeds as follows :—Though they did so even without any formal notice of the petition by the other side for the purpose of expediting payment of the said large amount to them and, their request was made so early as 20th April last and a reminder was sent by my clients by registered post dated the 6th May and registered on the 9th Idem and received by the Head Clerk on the 11th of the said month and though my clients subsequently went and requested the suit clerk to send the refund order by post, which he said would soon be done, nothing has been done as yet." After receipt of the application by the purchaser, the reminder referred to in the notice and the lawyer's notice, a notice was issued on the 15th of June by the Deputy Collector calling upon the petitioner to pay Rs. 138-6-3. I find a calculation made by the Deputy Collector's office which shows that the arrears was Rs. 168-14-3 and the commission was Rs. 135 making up a total of Rs. 303-14-3, that Rs. 165-8-0 had already been paid and that Rs. 138-6-3 was the balance that he had to pay. On receiving information to pay, this amount was actually paid by

Adimoola Mudaliar v. Manicka Mudaliar.

the petitioner Notice was issued by the Deputy Collector informing the parties that the petition for setting aside the sale would be disposed of. Both parties appeared and the Deputy Collector set aside the sale.

Objection was taken before the Deputy Collector that, as the amount required under S. 131 of the Estates Land Act was not paid within the time limited by the Act, namely, 30 days from the date of sale, the sale ought not to be set aside. The Deputy Collector set aside the sale on three grounds. He held that the non-payment of the proper sum within 30 days was due to the fact that, owing to want of records, a sum was asked to be paid which did not represent the full amount payable under S. 131. He states that the petitioner acted on the statement made by the Deputy Collector as to the amount payable and that, if there was a mistake, the mistake being that of the office, ought not to prejudice the petitioner. The Deputy Collector set aside the sale on the ground that the purchaser having agreed to the sale being set aside and to the deposit being paid over to him he is estopped from contending that the sale ought not to be set aside because of the payment being not in accordance with the section. The third ground which he sets out is that there were irregularities in the sale which rendered the sale invalid. He also refers to the contention raised that being an inam it could not be brought to sale before enfranchisement.

The petitions are filed under S. 115 C. P. C. and S. 107 of the Government of India Act, and before I can interfere it has to be shown that the Court exercised a jurisdiction not vested in it by law or failed to exercise a jurisdiction so vested, or acted in the exercise of its jurisdiction illegally or with material irregularity. The contention of Mr. Ramachandra Iyer for the purchaser is that the amount which has to be paid being an amount which has to be arrived at merely by arithmetical calculation, the petitioner was fully competent to have known what the amount was when he himself states the amount of the sale in his petition and that, even assuming that there was some error in calculation or an error made in the Deputy Collector's office, it is not a ground for excusing the non-payment of the full amount required; secondly, that there is nothing on the record to show that the Deputy Collector fixed the amount that was payable or told him to pay a particular sum and that he was misled by such order ; thirdly, that there can be no question of estoppel because the petition to refund the purchase-

Adimoola Mudaliar v. Manicka Mudaliar.

money proceeded on a statement that if the amount due and payable as required by the section had been paid, that amount ought to be paid over to the purchaser. He states that the Deputy Collector assumed a jurisdiction to set aside the sale on grounds which are not warranted by the very facts which he sets out and that, consequently, he has acted without jurisdiction by mis-directing himself upon the question of law. The contention for the respondent is that there is sufficient material on record to show that the petitioner before the Deputy Collector's Court was not aware of the exact amount payable, that he applied for information to the Deputy Collector, that the Deputy Collector, who might have refused information or assistance did render the assistance that was required and that the question therefore, as to whether the party was misled is a question of fact which was within the competence of the Deputy Collector to decide and, having decided it in favour of the applicant, there is no want of jurisdiction or irregularity in procedure. It is also contended that the question as to whether the purchaser is estopped or not is a question of fact which it was in the competence of the Deputy Collector to decide. Questions were also raised as to whether S. 131 of the Estates Land Act precludes an application to set aside a sale for irregularity. It was argued that having regard to S. 192 of the Act, which makes S. 311 of the C. P. Code inapplicable (owing to its not being included in the category of the sections enumerated), it was open to the Deputy Collector to go into the question of irregularity also. The question as to whether a sale could be set aside on the ground of irregularity under the Estates Land Act is not free from doubt, but I think it is unnecessary to decide that question in this application, because, if the sections of the Code are applicable, the present application, being only to set aside the sale under S. 131 of the Estates Land Act which corresponds to S. 310 (*a*) of the Civil Procedure Code, it is not competent to the Court to go into any question of irregularity in the sale. I do not, therefore, say anything further on this point.

As regards the question as to whether the petitioner in the lower Court was misled by an act of Court, I agree with the contention raised by Mr. Varadachariar. I have already stated the facts attending on the payment of the money. There can be little doubt that the Deputy Collector on the 10th of April, when the petitioner applied and asked to know how much the actual amount payable by him was, asked the office to find

out the amount due and that Rs. 15-8-0 was paid, as appears from the record, on that date. I think it is a fair inference to draw from this fact that Rs. 15-8-0 was paid in consequence of the office informing the petitioner that Rs. 15-8-0 was the amount that was due and which he had to pay to make up the amount payable under the Code. It, therefore, seems to me that the amount which the petitioner paid was the amount which he paid on information given by the Court as to the amount payable. In his petition to set aside the sale he says that he was not served with any papers before the sale and, if this statement is true and there is nothing in the record to show that it is not so he could not have known the exact amount payable except from what he heard ; so that he would have had to apply to some body for assistance in ascertaining the amount. He chose the person most competent to give details, namely, the Deputy Collector, and the Deputy Collector helped him in ascertaining the amount. It cannot be said that he had any reason to believe that the office would have given an amount which was incorrect and, even assuming that he had any doubts, he was justified on acting on the statement of the office in preference to what he might have thought was the amount that was payable.

On these facts, the question is whether the delay ought to be excused. Mr. Ramachandra Aiyar concedes that, if the mistake was a mistake of the Court and if the party was misled, then it will be a ground for excusing the payment after time ; but he states that there is nothing to show that the Deputy Collector gave the petitioner any information by which he was misled. I have given my reasons for holding that the petitioner was misled by the figures given on application by him to the Deputy Collector. This is not a case where the petitioner applies to an irresponsible officer for information but where he applies to the Court which ordered the sale for ascertainment of the amount payable by him, and such information was given by the Court. Under these circumstances, I think that the principle in *Abdul Latif Moonshi* v. *Jadub Chandra Mitter* (1) and *Makbool Ahmed Chowdry* v. *Bazle Sabhan Chowdry* (2) applies. Reference has been made by Mr. Ramachandra Aiyar to *Chundi Charan Mandal* v. *Banke Behary Lal Mandal* (3), but there is nothing in that case which

1. I L R 25 C 216. 2. I L R 25 C 609. 3. I L R 26 C 449.

Adimoola Mudaliar v. Manicka Mudaliar.

overrules the principle of the decisions in I. L. R. 25 Cal. referred to above. Maclean, C. J. begins his Judgment by stating that he "did not intend to lay down, as an absolutely hard and fast rule, that if the 5 per cent. on the purchase money and the amount specified in the proclamation of sale were not paid within the thirty days, the Court was powerless to set aside the sale." He also states that he is "not prepared to say that, if the judgment-debtor has been misled by a mistake of the Court, the consequence of that mistake ought to fall upon him." The other Judges also take the same position. Jenkins, J. observes that "it is essential to the respondent's success that it should be established that he has been prejudiced by the act of the Court and that the mistake that has been made is attributable to that act"; and he states that "what constitutes an act of the Court must depend on the circumstances of each case." If I am right in holding that the petitioner in the lower Court depended upon the statements made by the Deputy Collector, I think that the present case falls within the ruling enunciated and there can be no want of jurisdiction or error which will entitle me to set aside the order of the lower Court. I do not therefore, think it necessary to go into the other question of estoppel.

In my opinion, there is no ground for interference with the order which also I think is right on the merits. C. R. P. Nos. 783 and 894 of 1922 are dismissed with costs, and C. R. P. No. 893 of 1922 is also dismissed but without costs.

C. A. S. *Petition dismissed.*

PRIVY COUNCIL.

PRESENT:—VISCOUNT HALDANE, LORD BUCKMASTER AND LORD PARMOOR.

Ma Than Than *Appellant**

v.

Ma Pwa Thit *Respondent.*

(On apepal from the Chief Court of Lower Burma.)

P. C

Ma Than Than v. Ma Pwa Thit

Burmese Law—Adoption—Keittima adoption—Ceremonies necessary—Proof of adoption—Quantum—Witness—Credibility—Trial Judge—Opinion of—Appeal—Interference in—Propriety — Award — Validity — Arbitrators — Misconduct

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*P C Appeal No. 95 of 1922. 6th July, 1923.

P. C.
Ma Than Than
v.
Ma Pwa Thit
Lord Parmoor.

—*Award based on—Findin in award—Release given in pursuance of award—Binding character of.*

There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety that the alleged *keittima* adopted daughter lived in the house of her alleged adoptive father from her babyhood for 12 or 13 years, and that he was entered on the register of the school as her parent, and paid the school-fees.

Where the evidence in the case was clear that the appellant lived in the house of K. as his adopted daughter, and was publicly recognised by him as his adopted daughter, *held,* reversing the decision of the Chief Court and restoring that of the trial Judge, that the appellant had proved that she was the Keittima adopted daughter of K.

It may well be that although a witness is credible, yet that his recollection of a particular incident is not of such a character as to carry much weight.

Where the Judge, who has seen the witness and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness box.

An award based on the collusive action of the arbitrators is necessarily wholly invalid owing to their misconduct.

An award based on the collusive action of the arbitrators found that the appellant was the *keittima* adopted daughter of K, and was entitled to a fourth share of his estate, or Rs. 30,000. In pursuance of the award the respondent, the other party to the arbitration paid the sum of Rs 30,000 to the appellant and obtained a deed of release from her. *Held,* that the finding in the award, that the appellant was the *keittima* daughter of K could not be relied upon by her, and that the payment of Rs 30,000 under the terms of the award could not be regarded as a valid release of the claims of the appellant against the estate of K.

On appeal from the Judgment and Decree of the Chief Court of Lower Burma, preferred against the Judgment of Mr. Justice Robinson.

Dunne, K. C. and *Raikes* for the appellant.

Montgomery, K. C. and *Dube* for the respondent.

1923. 6, July. The Judgment of their Lordships was delivered by

Lord Parmoor

Lord Parmoor :—The question involved in this appeal is whether the appellant is the *keittima* adopted daughter of Ko Po Kyaw and Ma Nyun. Ko Po Kyaw died at Edward Street, in Rangoon, on the 27th October, 1916, leaving considerable property, worth from Rs. 1,00,000 to Rs. 1,50,000. Ma Nyun was the first wife of Ko Po Kyaw. The appellant claims that she was adopted as *keittima* daughter in or about 1893, after the deceased, and his first wife, had been married

P C.

Ma Than Than v. Ma Pwa Thit

Lord Parmoor.

16 years without children. The respondent was the fifth of the six wives of the deceased. She was married to the deceased about 1906, was divorced from him about six months later, but resumed living with him after the death of his sixth wife, and was living with him at the time of his death. The appellant was born in 1892, being the daughter of Ma Gyoke, who was a cousin of Ko Po Kyaw, and married to Ko Maung Gale. In the first Court the Judge, Mr. Justice Robinson, gave judgment in favour of the appellant, but this judgment was set aside in the Court of Appeal.

At the trial of the action, there was a considerable conflict of evidence between the witnesses, called respectively on behalf of the appellant and respondent. Mr. Justice Robinson held that implicit trust might be placed in the evidence of Maung So Naing, who had joined Ko Po Kyaw in business many years ago, and was the trusted manager of the business. He lived in Ko Po Kyaw's house, and was treated like a brother. There is no doubt of the importance of the evidence of Maung So Naing, but in the Court of Appeal his evidence was treated as unreliable, and the Chief Justice regrets that he cannot agree with the learned Judge's opinion of this man's impartiality. Before further considering the weight that should be given to the evidence of Maung So Naing, it will be well to state shortly certain facts which are either not disputed, or which, in the opinion of their Lordships, have been clearly established.

Ko Po Kyaw and Ma Nyun took the appellant, when she was a child, aged about one year, away from her parents, and she lived in the house of Ko Po Kyaw in Edwards Street for the next thirteen or fourteen years. She was taken to Ko Po Kyaw's house with the consent of the natural parents, and Ma Gyoke, the natural mother, states that she was taken to be adopted by Ko Po Kyaw and Ma Nyun ; and this statement, which alone might be of little value, is in accord with the subsequent sequence of events. From the time that the appellant was taken to the house of Ko Po Kyaw she appears to have been brought up publicly as his daughter, and to have lived openly and continuously under his protection. Their Lordships attach much importance to the evidence of Maung Po Lun, who kept a school in Rangoon, and who entered the appellant's name in the School Register for the month of March, 1899, according to the regulations prescribed for the students' names in native schools. The entry in the register

P.C.
Ma Than Than v. Ma Pwa Thit
Lord Parmoor.

was produced, and in the column in which the name and occupation of parent or guardian is entered, the name entered is :—

"Maung Ba Kyaw, Trader, Edward Street."

In the first place, it is clear that the name entered in the register is not the name of the natural parents, and secondly, their Lordships see no reason for doubting that the name actually entered was that of Ko Po Kyaw, although some doubt is thrown on this in the judgment in the Court of Appeal. Evidence was further given that the school fees were paid by Ko Po Kyaw during the time that the appellant remained at school. A further exhibit from the school register was produced containing the entry of the appellant's sister, Ma Than Kin, and in this case the name entered as parent is that of the natural father Mg. Mg. Gale. After the appellant had left school she continued to sleep in Ko Po Kyaw's house until she was about fourteen years of age, after which she slept in the house of her natural mother Ma Gyoke. The reason given for this change is that, at this time, Ko Po Kyaw brought Ma Pwa Gya as a wife from Mandalay, and that, as she often went up to Mandalay, there was no female companion for the appellant at Edward Street. The appellant did not cease to visit Ko Po Kyaw's house frequently, and it is not suggested that, if she had become his adopted daughter, there was any action which denoted repudiation of her adoption, even if such repudiation is possible, a matter not before their Lordships, and on which their Lordships give no opinion.

The facts stated above point directly to the conclusion that Ko Po Kyaw did adopt the appellant as his *keittima* daughter. There is no special ceremony in Burmese adoption, but the adoption must be a matter of publicity and notoriety. It is strong evidence of such publicity and notoriety. that the appellant lived continuously in the house of Ko Po Kyaw from her babyhood for twelve or thirteen years, and that he was entered on the register of the school as her parent, and paid the school fees. Moreover, there is evidence that the appellant was given jewelry by Ko Po Kyaw to wear, and that Ko Po Kyaw also paid for her clothes. It is, however suggested that this evidence is consistent with Ko Po Kyaw taking over the charge of the daughter of his relative, Ma Gyoke, and bringing her up in his house, as an assistance to his relative, but without the intention of adopting her as his *keittima* daughter. It is in reference to this suggestion that it becomes necessary to consider shortly the more important evidence

P.C.
Ma Than Than v. Ma Pwa Thit
Lord Parmoor.

adduced at the hearing. Undoubtedly, the most important witness is Maung So Naing. Mr. Justice Robinson, who saw Maung So Naing and heard his evidence, held that he was a credible witness, that is to say, a witness whose evidence could be trusted and who intended, within the best of his recollection, to tell the truth.

It may well be that although a witness is credible, yet that his recollection of a particular incident is not of such a character as to carry much weight, but in this instance, if Maung So Naing is to be accepted as a credible witness, it is hardly possible to reject the evidence which he gives as to the adoption of the appellant. He states that he was present at the time of adoption, together with the members of the household of Ko Po Kyaw, and that a *kinmoodat* ceremony was performed, and that the *phoongyis* were invited and fed. If this evidence has been invented for the purpose of the case, Maung So Naing could not be regarded as in any sense a credible witness and the Court of Appeal in rejecting it have directly differed from Mr. Justice Robinson on the question of credibility. In the Court of Appeal certain inconsistencies in the evidence of Maung So Naing were referred to in support of the view that he was not a credible witness, and he was further criticised for his conduct in withholding the key of the safe after the death of Ko Po Kyaw, but it appears to their Lordships that, in this respect, he acted rightly, and in accord with the responsibilities which he came under at the death of Ko Po Kyaw. Where the Judge, who has seen a witness, and has heard his evidence, comes to the conclusion that the witness is credible, that is to say, a witness who to the best of his recollection intends to tell the truth, it requires circumstances of exceptional character to justify a Court of Appeal in coming to a different conclusion. It is not a question of the weight of evidence, but of the attitude and trustworthiness of the witness, and of the effect of his whole demeanour in the witness box. In the opinion of their Lordships there are no such exceptional circumstances in the present case, and accepting Maung So Naing as a credible witness, it is clear that the appellant lived in the house of Ko Po Kyaw as his adopted daughter, and was publicly recognised by him as his adopted daughter. Evidence was given on behalf of the respondent by three near relatives of Ma Nyun and by U. Maung Gyi, a Pagoda Trustee, and rice miller, who state that they knew nothing of the adoption of the appellant by Ko

P.C.

Ma Than Than v. Ma Pwa Thit

Lord Parmoor.

Po Kyaw, but if the evidence of Maung So Naing is believed this negative evidence has little value.

There is a further special incident in the case to be considered. It is said that the dispute was referred by the parties to the arbitration of four *lugys*, or elders, each party nominating two elders, and that on the 10th November, 1916, the parties executed an agreement of reference. There is a question as to what were the matters in dispute to which the deed of agreement referred, but on the same day the *lugys* made and delivered, what purported to be an award, finding that, under the Buddhist Dhammathats, the *keittima* daughter, Ma Than Than, is entitled to a fourth share of the estate of Ko Po Kyaw, or Rs. 30,000, and that in accordance with this award the defendant, Ma Pwa Thit, shall, at the time of registration, in the Registration Office at Rangoon, pay the said sum in full into the hands of the *keittima* daughter, Ma Than Than. On the following day a sum of Rs. 30,000 was paid to the appellant by the respondent, and a deed of release was executed by the parties in the presence of witnesses. What is the effect of this award and release ? Mr. Justice Robinson held that the arbitrators acted collusively with the respondent, and that, by reason of such collusion, the award was invalid. It was not thought necessary to give any decision on this point in the Court of Appeal, but, in the opinion of their Lordships, the evidence is amply sufficient to maintain the finding of Mr. Justice Robinson. The result is that the award must be regarded as invalid. The finding in the award, that the appellant was the *keittima* daughter of Ko Po Kyaw, is not a finding on which the appellant can rely, and the payment of Rs. 30,000 under the terms of the award cannot be regarded as a valid release of the claims of the appellant against the estate of Ko Po Kyaw. This sum is part of the terms of an award based on the collusive action of the arbitrators, and such an award is necessarily wholly invalid owing to their misconduct. Their Lordships are unable to attach importance to the subsequent inconsistent evidence given by the *lugys* at the trial, and agree with Mr. Justice Robinson that the release fails by reason of the decision that the award itself is vitiated by the collusive misconduct of the arbitrators.

In the result their Lordships will humbly advise His Majesty that the judgment of the Court of Appeal should be set aside with costs, and the judgment of Mr. Justice Robinson restored. In the Court of Appeal the appellant is entitled to

costs, and in addition to the ordinary costs, special advocate's fees of 10 gold *mohurs* a day for each day's hearing after the first. The respondent will pay the costs of the appeal.

Solicitors for appellant : *Sandersons and Orr Dignam.*

Solicitors for respondent : *Waterhouse and Co.*

Appeal allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE VENKATASUBBA RAO.

Kanna Panikkar and others. *Appellants** (*Plaintiffs and L. R. of 3rd Plaintiff*).

v.

Nanchan and others. *Respondents* (*Defendants*)

Kanna Panikkar *v.* Nanchan

Malabar Law— Karnavan —Alienation of tarwad property —Suit by other members to recover property alienated—Limitation Act, Arts. 44, 91, 144—*Applicability—Karnavan executing deed of alienation not only as Karnavan but also as guardian of minor members—Effect.*

A suit by the junior members of a Malabar tarwad to recover possession of immoveable property improperly alienated by the Karnavathi is governed by Art. 144, and not by Art. 91, of the Limitation Act. The fact that the Karnavathi purported to execute the document not only as Karnavathi, but also as guardian of the minor plaintiffs, will not make either Art. 91 or Art. 44 applicable to the suit.

Appeal against the decree of the Court of the Subordinate Judge of South Malabar at Palghat dated the 31st December 1921 in O. S. No. 30 of 1920.

C. V. Ananthakrishna Iyer and *C. V Mahadeva Aiyar* for appellants.

T. R. Ramachandra Aiyar and *N. R. Lakshmana Aiyar* for respondents.

The Judgment of the Court was delivered by

Phillips, J.

Phillips, J. :—It has been held in *Chandu* v. *Kambi* (1), *Unni* v. *Kunchiamba* (2) and followed in *Chappan* v. *Paru* (3) that the members of a tarwad need not sue to set aside an alienation by the Karnavan but can sue to recover possession on the strength of title. In the latter case one ground for the decision was that the alienation though not binding on the tarwad

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*Appeal No. 133 of 1922. 5th December, 1923.

1. (1885) I. L. R. 9 M 208 2. (1890) I L R 14 M 26

3. (1912) I L R 37 M 420.

might be binding on the karnavan. In this view Art. 91 of the Indian Limitation Act would not be applicable to the present case, but it is argued that in as much as the karnavathi purported to execute the document not only as karnavathi, but also as guardian of the minor plaintiffs, consequently the minors are parties to the document, and as such are bound to set it aside before recovering the property. But can it be said that minors are parties in that sense ? It has been held in the case of Hindu Mitakshara families that sons when minors are represented in a document through their guardian they need not set it aside. [*Kovvuri Thirupathi Raju* v. *Kovvuri Venkataraju* (4) and *Genesha Iyer* v *Amirthaswami Odayar* (5)]. The principle that underlies the construction put forward by Mr. T. R. Ramachandra Iyer is that parties are bound by their own acts until they are set aside or cancelled, but minors cannot act and therefore the mere addition of their names in the document cannot make the document their act which must be set aside. In this connection we may refer to *Chingacham Vitil Sankaran Nair* v. *Chingacham Vitil Gopala Menon* (6). Article 44 does not apply here as the alienation does not purport to be one by a guardian alone, but also by a karnavathi, who under certain circumstances has authority to alienate apart altogether from her guardianship of minors. As neither article 91 nor Article 44 is applicable, Article 144 must be applied and the suit is within time. The suit will therefore be remanded to the lower Court for disposal, after allowing plaintiffs time to amend the plaint and pay additional Court fee if necessary. Costs will abide the result. The Court fee in appeal will be refunded.

Kanna Panikkar v. Nanchan — Phillips, J

A. S. V *Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLER.

Ratnam Pillai and another *Petitioners** (*1st and 15th respondents 1st and 15th defendants*)

Nataraja Desikar (deceased)
Annamalai Desikar *Respondent* (*Petitioner—Plaintiff*).

Ratnam Pillai v Annamalai Des kar

Legal Representative—Religious institution—Mutt—Suit by wrongly appointed head on behalf—Death of plaintiff pendente lite***—Right of lawfully appointed***

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*C R Ps Nos. 311 and 312 of 1923. 1st, 2nd and 16th November, 1923.

4. (1917) 40 I C 418. 5. (1918) M W N 892.

6. (1905) I L R 30 M 18.

Ratnam Pillai v. Annamalai Desikar

successor to continue suit—O. 22, Rr. 3 and 10—Applicability—Application under wrong rule—Order granting, under rule applicable—Propriety.

A suit brought on behalf of a mutt can be continued by a properly appointed successor on whom the representation of the institution has devolved. O. 22, R. 10, and not O. 22, R. 3, applies to such a case.

An application for being brought on record as the legal representative of a deceased party though made under a wrong rule, may be ordered under the proper rule, if any, applicable to the case.

Petitions under Ss. 115 of Act V of 1908 and 107 of the Government of India Act praying the High Court to revise the orders of the Court of the Subordinate Judge of Vellore in C. M. P. Nos. 37 and 599 of 1922 respectively in O. S. No. 42 of 1921.

C. A. Seshagiri Sastri for petitioner.

T. V Gopalaswami Mudaliar and *A. C. Sampath Aiyangar* for respondent.

JUDGMENT :—The facts appear to be this. Nataraja was in 1914 declared by the High Court to be a trespasser. He appealed and the High Court's decision was upheld by the Privy Council in 1920. In that interval in 1919 he had filed this suit as head of the Mutt. After the Privy Council's judgment Annamalai who has now been brought on the record as plaintiff was elected head of the Mutt. Some time afterwards Nataraja died and in 1921 (1922) Annamalai applied to be brought on record as his legal representative. This application was granted and the order granting it has been brought up in revision.

It is now argued that O. 22 R. 3 does not apply. It does not follow, however, that because an application has been made and granted under a wrong rule, respondent cannot be brought on record under the proper rule if any rule is applicable to his case.

On the whole I see no reason why Annamalai should not be allowed to continue the suit under O. 22, R. 10. Nataraja sued on behalf of and as head of the Mutt. No doubt he was found not to be the duly elected head of the mutt, but as de facto trustee is allowed to sue vide *Kasi Chetty* v. *Srimath Devasikamani Nataraja Desikar* (1). If Nataraja had a right to sue as representing the Mutt, it seems to me that on the appointment of a properly elected head the right to sue devolved on the latter. It would have been a very different matter had

1. (1913) M W N 181.

Nataraja sued in his personal capacity. Here the real plaintiff is the Mutt and a suit brought on its behalf even by a wrongly appointed head can I think, be continued by a properly appointed successor on whom the representation of the institution has devolved.

Respondent will be allowed to continue the suit. The petitions are dismissed with costs (one set).

A. S. V. *Petitions dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE K. C. *Chief Justice,* AND MR. JUSTICE WALLER.

C. Doraivelu Mudaliar and others. *Appellants* (Plaintiffs)*

v.

G. R. Audikesavalu Naidu *Respondent (Defendant)*

Doraivelu Mudaliar *v.* Audikesavalu Naidu

Receiver—Discharge of —Scheme suit —Decree in —Receiver appointed in pursuance of—Appeal against decree—Affirmance of decree with slight modifications—Effect of appellate decree on receivership—No ipso facto *discharging of receiver.*

A suit brought on the original side for a scheme to be framed in relation to a temple was decreed and a scheme framed. An appeal was lodged against that decree ; but before the case came on in appeal, an application was made to a Judge sitting on the original side for the appointment of a receiver, and an order was made appointing a receiver. The appellate Court affirmed the decree of the Court below with slight modifications, with the result that the scheme framed by the trial Judge stood in operation as from the date fixed by his order with the modifications decreed by the Court of appeal. After the order in appeal, a Judge's summons was taken out on the original side for the discharge of the receiver on the sole ground that the effect of the order of the Court of appeal was to put an end to the receivership. *Held,* that the effect of the order of the Court of appeal was not *ipso facto* to discharge the receiver, and that the summons was therefore taken out on entirely wrong grounds and must be dismissed.

On appeal from the Judgment and order dated the 27th day of February 1922 of the Hon'ble Mr. Justice Kumaraswami Sastri passed in the exercise of the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 393 of 1915.

V. Sivaprakasa Mudaliar for appellants.

A. Duraiswami Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal from an order of Kumaraswami Sastri, J., in Chambers on

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*O S Appeal No. 46 of 1922. 14th November, 1923.

Doraivelu Mudaliar v. Audikesavalu Naidu

Judge's summons to discharge the receiver of certain temple property and to order the receiver to put the hereditary trustee of that temple in possession of properties and documents relating to the temple. The facts are these. A suit was brought asking for a scheme to be framed in relation to the temple, which was tried by Kumaraswami Sastri J., and he in due course gave a decree and framed a scheme. An appeal was lodged against that decree and there was a cross appeal. Before the case came on in appeal, an application was made before Phillips, J. for the appointment of a receiver, there being allegations made that the trustee did not properly account, would not hand over or produce books, and was not behaving as a trustee should behave under the scheme as framed by Kumaraswami Sastri, J., and having heard the application on several occasions with the trustee before him, Phillips, J., ordered that a receiver should be appointed. The appeal then came on and this Court confirmed the order of Kumaraswami Sastri, J., but to some extent, not to a very great extent, modified the scheme as framed by him. The scheme stands in operation as from the date fixed by Mr. Justice Kumaraswami Sastri's order with the modifications decreed by the Court of appeal. After the order in Appeal, this summons was issued and the case was put before the Court solely on the ground that the effect of the order of the Court of appeal was to put an end to the receivership and in the words of the affidavit "that the receiver became *functus officio* and automotically ceases to be receiver." The plaintiff and the receiver, alleging, as I understand, that they were supported by the Advisory Board, opposed this summons and alleged that the trustee was still an unfit person to have control. The matter came before Kumaraswami Sastri, J., again and he decided that the effect of the order of the Court of appeal was *ipso facto* to discharge the receiver, and declined to go into any question as to whether or not the trustee was a fit person to have charge or to go into the question whether it was advisable in the interest of the temple that the receiver should be continued.

In my judgment that is wrong. The order of Phillips, J., was made quite irrespective of there being any appeal. His Jurisdiction to make the order depended on one or two things, either on the scheme then in operation which provided that applications be made to the Court by summons, or by reason of his powers under O. 40, R. 1 of the Civil Procedure Code which

gives the Court power to appoint a receiver of any property whether before or after decree, where it appears to the Court to be just and convenient to do so, and that order continued until it was put an end to. It was not put an end to by the Court of appeal which merely varied the scheme. That being so, this order, in my judgment, is wrong, and this appeal must be allowed with costs. The summons which was taken out before the learned Judge was taken out on entirely wrong grounds and must be dismissed with costs. But I wish to make it quite plain that this does not in any way dispose of the real question which both parties say they desire to have decided. It is perfectly open to the trustee, if he is so advised, to take out a fresh summons asking among other things for the discharge of the receiver. It would be open to him on that application to contend that the scheme as framed by the Court of appeal gives ample protection to those interested, and that it is no longer necessary in the facts of this case to have a receiver. It would also be open on that application for the plaintiff, the receiver and the Board, if so advised, to bring any circumstances before the Court as to the conduct of the trustee or otherwise to enable it to arrive at a proper decision on that point. I think that it is unnecessary for me to point out that there are also ample powers under the scheme for the Board or other persons with the consent of the Advocate General to take steps in reference to the conduct of the trustee, if he has been guilty of any misconduct in recent times, as to which we say nothing and express no views.

The result is that this appeal should be allowed and the order of Kumaraswami Sastri, J., is set aside with the result that pending any fresh proceedings, the receiver will be reinstated.

Waller, J. :—I agree and have nothing to add.

A. V. S. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Kandasami Goundan and another *Petitioners** *(Defendants)*.

v.

Subbai Goundan and another *Respondents (Plaintiffs)*.

Kandasami Goundan v. Subbai Goundan

Court Fees Act, S. 7 (V) (a) and (d)—Suit for possession of specific plot of land in a permanently settled estate—Valuation for purposes of Court-fees—

*C R P No. 822 of 1922. 6th December, 1923.

Kandasami Goundan v. Subbai Goundan

Market value—Plaint not properly stamped—Undervaluation—Return of plaint to Court having jurisdiction—Proper procedure—Civil Procedure Code, O. 7, Rr. 10 *and* 11.

A suit for the recovery of a specific plot of land situated within a permanently settled estate but not constituting a definite share thereof or separately assessed to revenue, falls within cl. (*v*) (*d*) and not under cl. (*v*) (*a*) or (*b*) of S. 7 of the Court Fees Act. Court-fee should therefore be paid on the market-value of the property in suit.

Godavarty Sundaramma v. *Godavarty Mangamma* 8 L W 88 ; *Chandan Han* v. *Bishan Singh,* I L R 33 A 630 relied on.

The plaintiff in the above suit having valued his plaint at ten times the share of the Government revenue due on the land, the Court directed him to pay Court-fee on its market value. The plaintiff did not pay and the Court holding that the subject-matter of the suit exceeded its jurisdiction directed the return of the plaint for presentation to a superior Court. *Held,* that the procedure of the Court below was illegal. The Court should have first called upon the plaintiff to state the market value and then directed him to pay the proper Court-fee on his plaint and on his failure to do so, rejected the plaint. If the plaintiff paid the requisite Court-fee and it was then found that the valuation of the suit went beyond the jurisdiction of the Court, the plaint should have been returned for presentation to the proper Court.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the order of the District Court of Coimbatore in C. M. A. No. 34 of 1922 preferred against the order of the Court of the Additional District Munsif of Coimbatore dated 30—3—1922 in O. S. No. 13 of 1921 (O. S. No. 709 of 1921, Principal District Munsif's Court, Coimbatore).

S. Subramania Aiyar for petitioner.

C. S. Venkata Chariar for respondents.

The Court delivered the following

JUDGMENT :—The question that has been raised in this Civil Revision Petition is one of jurisdiction. The suit is brought for possession of a plot of land which forms part of a zamindari estate, by one ryot against another and the question which arose and which was tried as a preliminary point by the first Court was, " Is the suit properly valued for purposes of Court-fee and jurisdiction ? " The District Munsif held that S. 7 (*v*) (*d*) of the Court Fees Act applied as the land formed part of an estate paying revenue to Government but was not a definite share of such an estate and was not separately assessed as mentioned in cls. (*a*) to (*c*), and that therefore court-fee should be paid on the market value of the land. But, without fixing the market value, he directed the plaint to be

amended and the *ad valorem* court-fee to be paid on such value. That order was not obeyed and, instead of rejecting the plaint, what he did was this. He considered that the market value of the land *plus* the value of the other reliefs claimed made the subject matter of the suit exceed his jurisdiction and directed the return of the plaint to be presented to the proper Court. On appeal, the District Judge held that the suit fell within cl. 7 (*v*) (*a*) of the Court Fees Act as the land was in his opinion a definite share of an estate paying annual revenue to Government under clause (*a*).

The construction of S. 7, cl. V (*a*) to (*d*) has been the subject of consideration both in this Court and in the Allahabad High Court. In *Godavarty Sundarammav.Godavarty Mangamma* (1) it was held that sub-clause (*a*) referred only to a definite fraction or share of an estate and not to any piece of land which formed a plot defined by metes and bounds included in an estate in other words, that the clause would apply only when the suit was for a half, one-third or any other fractional share of the entire estate. That view was followed in two unreported cases of this Court, S. A. Nos. 886 of 17 and 711 of 1915, and also in *Chandan* v. *Bishan Singh* (2). It seems to me that that view is correct and I respectfully follow it. If that is correct, this suit should have been valued under sub-clause (*d*) and not under sub-clause (*a*) of S. 7 of the Court Fees Act. It is clearly excluded from the second part of sub-clause (*a*) because it is not recorded in the Collector's register as separately assessed with annual revenue, the paimash register being not such a register as the collector's register referred to. In these circumstances the suit should have been valued, as held by the District Munsif, under sub-clause (*d*) of 7 (*v*) of the Court Fees Act.

But the District Munsif should not have returned the plaint to be presented to the proper Court at the stage he did as that was not a proper order there. He should have first called upon the plaintiff to state what the market value of the land was and after taking evidence as to that value if disputed which may be adduced on either side, he should have himself determined what the market value was, and then he should have called upon the plaintiff to pay the proper Court Fee on

1. 8 L. W. 88 2. (1910) I L R 33 A 630 : 8 A L J 798.

that valuation giving him a reasonable time to make the payment and, if he then failed to make the payment, he should have rejected the plaint, but if he made the payment and if it was found that the valuation of the suit went beyond his jurisdiction, then returned the plaint for presentation to the proper Court. The Munsif was not justified in returning a plaint which was not properly stamped.

I must therefore set aside the orders of both the lower Courts and remand the case to the Court of first instance and direct that Court to decide what the market value of the land is and then dispose of the case in the light of the observations above made.

As regards costs, if the District Munsif rejects the plaint or finds finally that he has no jurisdiction to try the suit, the petitioner will have his costs of this revision petition and of the appeal in the lower Court : and the costs before the District Munsif will be disposed of by the District Munsif himself. If, on the other hand, the District Munsif finds that he has jurisdiction to try the suit and tries it, all costs here and below will abide and follow the final result of the suit.

A. V. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE SPENCER.

Arumuga Goundan and others. *Petitioners** (*Defendants Nos. 4 to 5*).

v.

Periavanjiappa Goundan and others *Respondents* (*Defendants Nos. 1 to 3 and Plaintiff*).

Arumuga Goundan v. Periavanjiappa Goundan

Civil Procedure Code, S. 151—Inherent power—Suit disposed of—Minors—No proper representation—Decree declared not binding—Restoring suit to the file—Addition of parties—Powers of Court.

The decree in a certain suit simply declared that another decree passed in a prior suit was not binding on certain minors as they were ont validly represented by a guardian. Thereupon the Court which passed the prior decree took the case again on its file under S. 151, C. P. Code and proceeded to try it after making the minors parties to the suit.

Held, the Court did not possess inherent powers to restore a suit once disposed of to its file and to add as parties to it persons who were not represented at the original trial.

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*C R P No. 385 of 1923. 7th December, 1923.

Arumuga Goundan v. Periavanjiappa Goundan

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order dated the 2nd October 1922, of the Court of the District Munsif of Udumalpet in I. A. No. 1334 of 1922 in O. S. No. 559 of 1919.

C. S. Swaminathan for petitioners.

T. G. Ramaswami Iyer for respondents.

The Court delivered the following

JUDGMENT :—In Original Suit No. 479 of 1921 it was decided that the decree in O. S. No. 559 of 1919 was not binding on the minors because they were not validly represented in the earlier suit, the guardian appointed by the Court not having consented to act as guardian and not having appeared for them at the trial.

The decree in O. S. No. 479 simply declared that the decree in O. S. No. 559 was not binding on the minors, and in this respect it was in accordance with what in the view of the Privy Council in *Monohar Lal* v. *Jadunath Singh* (1) was a proper decree, *viz.*, that it would be sufficient in such a case to remit the parties to their original rights without declaring that the earlier suit would have to be tried afresh.

In the judgment in O. S. No. 479 there is an observation that O.S. No.559 will have to be revived as against these minor plaintiffs, and the District Munsif has now in the exercise of his supposed powers under S. 151, C. P. C., taken the case back on his file and proceeded to try it. I do not think that the Court possessed inherent power to restore a suit once disposed of and to add parties to it who were not represented at the original trial. *Bhagwan Dayal* v. *Param Sukh Das* (2) is quoted as an authority for so doing, but that case has been dissented from by a Bench of this Court in *Eda Punnayya* v. *Jangala Ramakottayya* (3). As pointed out by Oldfield and Seshagiri Iyer, JJ., if a minor is not properly represented before the Court, a decree passed against him is in effect a nullity and the Court cannot set aside the *ex parte* order and re-open the suit under O. IX R. 13.

If the minors were not legally made parties to the suit, the action of the Court in making them parties now is tantamount to restoring to file a suit already disposed of and add-

1. I L R 28 A 585. 2. I L R 39 A 8 3. (1920) M W N 1.

ing parties who were not represented at the original trial. The case in *Venkata Row* v. *Tuljaram Row* (4) is not an authority for such a proceeding.

I set aside the order of the District Munsif with costs in this Court and remit the parties to their rights as they stood at the disposal of O. S. No. 479 of 1921.

T. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Sithamalli Subbayyer .*Appellant** (*Petitioner-defendant*)

v.

M. L. M. Ramanathan Chettiar .*Respondent* (*Respondent-plaintiff*).

Sithamalli Subbayyer v. Ramanathan Chettiar

Civil Procedure Code, O. 11, Rr. 14 and 21—Order for production of documents—Non-compliance with—Dismissal of suit not justified.

O. 11, R. 21 of the C. P. Code does not justify the dismissal of a suit for non-compliance with an order under O. 11, R. 14, C. P. Code for production of documents.

Ramnath v. *Parbhu Dayal* (1923) 65 I C 661 dissented from.

Appeal against the order of the Court of the Second Additional Subordinate Judge of Madura, dated 10th April, 1923 in Interlocutory Application No. 100 of 1923 in O. S. No. 5 of 1922.

K. V Krishnaswami Aiyar, C. A. Seshagiri Sastri and *N. Swaminatha Aiyar* for appellant.

T. M. Ramaswami Aiyar and *C. Rama Rao Sahib* for respondent.

The Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.* :—In this case the defendant had applied to the Subordinate Judge for an order of discovery of documents against the plaintiff under O. 11, R. 12, C. P. Code. The learned Judge refused to give such an order but directed the defendant to file a list of documents which he alleged were with the plaintiff, and on his doing so, passed an order under R. 14 directing production of such documents upon oath. The plaintiff produced certain documents in Court and prayed the Court to keep them under lock and key. He also filed an affidavit. Under the Subordinate Judge's orders the documents were kept under lock and key. The defendant

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* A A O No. 213 of 1923. 12th December, 1923.

+ (1917) M W N 30.

Sithamalli Subbayyer v. Ramanathan Chettiar — Krishnan, J.

then applied for inspection and by a separate order after hearing parties inspection was ordered of the documents filed in Court by the plaintiff. On defendant inspecting those documents he found that some of the documents included in his list were not produced, in particular the rough chitta books he had asked for. Thereupon the defendant applied to the Court to take action under O. 11, R. 21 and to dismiss the suit. The Subordinate Judge dismissed the application holding that that rule did not apply to cases of non-compliance with an order for production and that the order for inspection which referred only to documents filed in Court was fully complied with. The appeal to us is by the defendant against that order of the subordinate Judge.

Rule 21 in terms does not apply to an order for production it speaks only of interrogatories or discovery or inspection. In the repealed Code the words " or production " were in the corresponding section but they have been omitted in the new Code. It is argued that the omission is due to a desire to avoid redundancy, as an order for production implied discovery and inspection. The opinion of Broadway J., of the Lahore High Court in the case *Ramnath* v. *Parabhu Dayal* (1) is cited in support of the argument that the object of the omission was to avoid redundancy. The learned Judge does not give a very decided opinion on the point nor has he discussed the question. On the other hand a Bench of the Allahabad High Court* has held that R. 21 does not apply to case of " production " orders. With all respect to the opinion of the learned Judge of the Lahore Court I am unable to follow his view. In the corresponding English Rule, O. 31 R. 21 of the English rules of Practice, the words " or production " do not occur and it was apparently to bring the practice here into conformity with the English practice on the point that the omission was made. An order for production is quite different from an order for discovery or an order for inspection and cannot be said to imply either. In the present case the order for discovery was refused and the order for inspection was passed as a subsequent order. It is impossible to hold therefore that in the present case the order for production was anything more

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1. (1921) 65 I C 661.

**The Lyallpur Sugar Mills and Co.* v. *Ramchandra Gur Sahai Cotton Mills and Co.*, 44 A 565.

Sithamalli Subbayyer v. Ramanathan Chettiar

Krishnan, J.

than for bare production in Court of specified documents. In the case *Joy v. Hadley* (2) the order was for production and inspection : it was in reality an order for inspection in Court of documents to be produced in Court for the purpose. That case is thus not an authority on the point before us. Some support was sought to be drawn from the wording of the Form 6 under O. 11 R. 14, first Schedule, Appendix C of the Code. That form can be properly used only where the order is " to produce for inspection " as the title of the form shows. Rule 14 contemplates further orders being passed on the documents being produced. An order for inspection of documents may, I think, therefore be passed under that rule itself after hearing parties ; R. 18 also enables a party to obtain an order for inspection. The form 6 cannot be relied on as showing that an order under R. 14 involves an order for inspection, for documents may be directed to be produced in Court for various other reasons, for example, for preventing tampering with them.

It was suggested that if we do not apply the provisions of R. 21 in cases of orders for production there will not be a sufficiently effective method to make the party obey the order of the Court. There is no basis for this argument, for there are several ways of making a party produce a document shown to be in his possession and for which privilege is not established ; and the presumption that arises against a party who is called upon and does not produce a document in his possession or power is in itself of serious consequence to him.

In the view I take that R. 21 does not apply to orders for production, the appeal fails. It is true that plaintiff has not definitely stated in his affidavit whether he has the chitta books with him or not. Defendant may apply to the lower Court to call for a further affidavit from him. Defendant can always take any further steps, he may be advised to, under the rules for inspection. This appeal fails and is dismissed with costs.

Waller, J., :—I agree.

A. V. V. *Appeal dismissed.*

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2. Cited in 32 Ch. D. 571.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE K. C. *Chief Justice* AND MR. JUSTICE RAMESAM.

W. H. Nurse *Appellant** (*Defendant*)

v.

Rustomji Dorabji *Respondent* (*Plaintiff*).

Nurse *v.* Rustomji Dorabji

Malicious Prosecution—Damages—Malice—Proof of—Indirect motive—Advantages in civil dispute—Advice of counsel—Effect of—Quantum of damages—Interference on appeal.

Where in an action for damages for malicious prosecution the Court finds that the defendant preferred an unfounded criminal charge against the plaintiff with the indirect motive of bringing pressure on the latter to settle a civil dispute then pending between the parties, the defendant must be held to have been actuated by malice. The opinion of counsel as to the propriety of instituting a prosecution will not excuse the defendant from liability unless he shows that he laid all the facts of his case fairly before him and acted *bona fide* on the opinion given by that counsel.

Ravenga v. *Mackintosh,* 2 B & C 593 referred to.

In an action for damages for malicious prosecution the trial Judge has a wide discretion, on the facts of the case before him, to say what, in his view, the damages should be ; and an appellate Court will not substitute its own discretion and interfere with the award of damages unless it finds that the trial Judge erred in law in awarding the damages that he did.

On appeal from the judgment of the Hon'ble Mr. Justice Coutts Trotter dated 15th March 1921, passed in the exercise of the Ordinary Original Jurisdiction of the High Court in C. S. No. 527 of 1919.

V. V. Srinivasa Aiyangar, and *A. Krishnaswami Aiyar* for appellant.

Messrs. Nugent Grant and *M. H. Hakim* instructed by *Short Bewes and Co.* for respondent.

The Court delivered the following

Sir Walter Salis Schwabe, C. J

JUDGMENTS :—*The Chief Justice* :—This is an appeal from a judgment of Coutts Trotter, J., in an action for malicious prosecution. He found for the plaintiff with Rs. 35,000 damages. The defences set up were that there was no malice and that there was reasonable and probable cause for the prosecution. As regards the latter point, I entirely agree with what was said by the learned Judge that there was no reasonable and probable cause for this prosecution. In considering that, I consider what the position was of the plaintiff in respect of the charge made against him in the Criminal Court, and I am quite satisfied that there was no ground at all for even suggesting that he had been guilty of

*O S A No. 78 of 1921. 5th December, 1923.

Nurse v. Rustomji Dorabji
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Sir Walter Salis Schwabe, C. J.

any criminal offence. No criminal offence, in fact, had been committed, and I can see no reason at all for suggesting that Mr. Nurse, the defendant, really had any reasonable ground for thinking that a criminal offence had been committed.

On the other part of the case, namely, whether there was malice, there are two matters to be considered. The first is whether the defendant acted with an indirect motive. The learned Judge found that he did, and I have no doubt that he was right. There was a dispute going on between the plaintiff and the defendant. The plaintiff had entered into a contract with the defendant under which the defendant was to build for him a cinema and then let it out to him. A point arrived in the relationship between them in relation to that cinema when things were at a deadlock. The defendant was, no doubt, contending that there would have to be some alteration in the terms up to that time existing between the parties, and I think it is fairly clear that the plaintiff recognised that there would have to be some modification or alteration. The defendant put forward a draft lease on terms which he thought reasonable ; the plaintiff rejected those terms and put forward an alternative which, in turn, the defendant rejected, and the plaintiff claimed to fall back or stand upon the written agreement. He said that there had been and was an agreement between the parties binding and effective whether that agreement was binding and effective or not at that date is a matter with which we are not concerned, and it is a matter on which I think it desirable to say nothing, in view of the fact that it is the subject matter of litigation between the parties. But that was the position when the defendant chose to apply for the arrest of the plaintiff on what, as I have already said, are wholly frivolous grounds, and I think the learned Judge was amply justified in coming to the conclusion he did that he did so with the indirect motive of hoping to be in a better position to negotiate with his opponent with a criminal charge hanging over his head than he would be in negotiating as between two persons on equal terms. I think it right to say that, in my view, I do not think that, on this evidence, Mr. Nurse had or could have had, any honest belief in the guilt of Mr. Rustomji. Either of those views are quite enough to justify the finding of my brother Coutts Trotter.

A further point arose on this point which is really a subsidiary part of this point, namely, that the defendant contends

Nurse v. Rustomji Dorabji

Sir Walter Salis Schwabe, C. J.

that he acted in launching this prosecution on the advise of counsel and that he claims to be protected by reason of that fact. It is no doubt the law that that protection is given where counsel's opinion has been obtained and where it is believed to be correct and acted upon. I think the law is correctly stated in the judgment of Bayley, J., in *Ravenga* v. *Mackintosh* (1), in which he said, " I accede to the proposition, that if a party lays all the facts of his case fairly before counsel, and acts *bona fide* upon the opinion given by that counsel (however erroneous that opinion may be) he is not liable to an action of this description. " It may be observed that, in order to escape by reason of the opinion of counsel, the first condition is that all the facts of the case are laid fairly before counsel, and the second condition is that he acts *bona fide* upon the opinion given by that counsel. I think it is quite clear in this case that all the facts were not laid fairly before counsel. The main ground of the prosecution was that a certain agreement between the parties, contained on four sheets of paper bearing a certain original date and giving a time limit for the building of the cinema, was from time to time altered by a fresh front sheet on a stamp paper with a new date being prepared by the solicitor to both parties and signed or initialled by the parties ; and it was alleged that, because the plaintiff took the new front sheet, attached it to the remaining sheets of the original agreement and tried to have the document so composed registered, he was committing the crime of cheating and of forgery. The greater part of the evidence in this case ranged round the question of what was the intention of the parties in having those front sheets prepared. The prosecution story was that they were prepared in order to become the front sheet to some subsequent agreement to be executed. The defence story was that it was the intention of everybody throughout that the new front sheet should be substituted for the old. The defendant went before his counsel and told him that it was the intention of both parties, when the new front sheets were made at different times, that they were not to be attached to the remaining sheets of the original agreement, and on that basis apparently counsel advised. It is quite clear, to my mind, on the evidence, that, so far from it being the intention of both parties that the new front sheets should not be attached to the original back sheets, it was the intention of both parties that they should be so attached and, indeed, that they were brought into existence for the purpose of

1. (1824) 2 B & C 593.

Nurse v. Rustomji Dorabji

Sir Walter Salis Schwabe, C. J.

being so attached. I do not think it is a very creditable story to any one concerned. They desired to extend the time under an existing agreement. They did it by substituting a new front sheet with a different date treating the execution of the original contract, witnessed as it was by several witnesses, as still being the execution of the final contract with a new date. I think also there was a desire on the part, at any rate, of some of the parties concerned that, as the stamp for the agreement for lease was an inadequate stamp, it might be possible to get a reduction of the penalty which was being incurred by reason of the stamp not being the right stamp, by putting before the registration authorities that the document was of recent date, whereas the chance of getting a reduction of penalty would be very much less if the authorities had been aware that the contract had been in existence for a very considerable time and acted upon, and was, in fact, renewed from time to time by this addition of a front sheet. However that may be, I am quite satisfied that it was the intention of both parties that it should be so used. In fact, the solicitor, who was the solicitor for both parties and who gave evidence at the Police Court at the Sessions Court, although he at first, particularly in the Police Court, tried to make out that it was contrary to the agreement that the front sheet should be attached to the others, when he got before the Sessions Court and was fully cross-examined, ultimately said in the plainest terms that the whole intention of the parties was that the new front sheet, in his words, "was to form part and take the place of the front sheet of the old agreement." That being so, it cannot, in my judgment, be said that the true facts were placed fairly by the defendant before counsel, when counsel advised, if he did so advise, that this prosecution should take place. Under these circumstances, I think that in this case there was ample evidence both of absence of reasonable and probable cause and of malice in fact.

There remains only the question of damages. In countries where these questions of tort are tried before a jury, damages are eminently in the province of the jury. Where, however, a case is tried before a Judge, the Judge has a very wide discretion, on the facts of the case before him, to say what, in his view, the damages should be ; but it is no doubt easier to get the damages reduced on a judgment from a Judge than, as in England in the case of a verdict by a Jury, because a Judge in his judgment states his reasons when he gives damages

Nurse v. Rustomji Dorabji — Sir Walter Salis Schwabe, C. J.

and states what influences him or what is in his mind when he gives those damages whereas in England where the Jury gives no reasons, it is almost impossible for the Court of appeal to know what operated on the mind of the Jury and it is difficult to establish that the damages are so excessive that no reasonable body of twelve men could have come to that measure of damages. I have had some little doubt in this case whether the learned Judge, who quite fully states his reasons for taking rather a strong view of the case as to damages, was not inclined to severity but, on the whole I think not. I am not certain as to whether I should not have awarded a lesser amount, but that is not what I have to consider. What I have to consider is whether the learned Judge was wrong in awarding the damages that he did. As has been pointed out, it is a serious thing, indeed, for a business man of position, more especially when he carries on business in another place, to be brought before the Criminal Court of Madras and kept here for some months with the anxiety of prosecution hanging over his head, having to incur very heavy costs here, which are separately provided for in the Judgment, and having to incur expenditure by reason of his being away from home, and being subjected to the injury which must necessarily accrue to the man's business, when he must be away from his business for a considerable time, and under a suspicion of having been guilty of serious criminal offences. Under these circumstances, I do not think it right to interfere with the Judgment here, and this appeal must be dismissed with costs. Certified for two counsel.

Ramesam, J. :—I agree and have nothing to add.

A. V. V. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, OFFICIATING CHIEF JUSTICE, AND MR. JUSTICE DEVADOSS.

John Joseph Brito *Petitioner* in both (Petitioner in C. R. P. No. 423 of 1922 on the file of the High Court).*

v.

Mrs. S. S. Brito *Respondent in both (Respondent in do)*

Brito v Brito

Civil Procedure Code, S. 109—Final Order—Revision—Order of High Court refusing to interfere in.

An order of the High Court refusing to interfere in revision with the order of a Subordinate Court restoring to file a suit which had been first disposed

*C M P Nos. 2886 and 2887 of 1923. 17th January, 1924.

Brito v. Brito

of upon an alleged compromise between the parties is not a "final order" within the meaning of S. 109, C. P. C.

S. 105, C. P. C. does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word "final" in S. 109.

C. M. P. No. 2886 of 1923.

Petition under O. 45 Rr. 2, 3 and 8 and Ss. 109 and 110 of Act V of 1908 cl. 39, Letters Patent, praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to grant a certificate enabling the petitioner herein to appeal to His Majesty in Council against the judgment and order of the High Court dated 18th July 1923 in C. R. P. No. 423 of 1922 presented to the High Court to revise the order of the Court of the Subordinate Judge of South Kanara in I. A. No. 565 of 1921 in O. S. No. 55 of 1920.

C. M. P. No. 2887 of 1923.

Petition praying that in the circumstances stated in the affidavit filed in C. M. P. No. 2886 of 1923 the High Court will be pleased to issue an order directing stay of all further proceedings in O. S. No. 55 of 1920 on the file of the Court of the Subordinate Judge of South Kanara pending disposal of the said C. M. P. No. 2886 of 1923 on the file of the High Court praying for leave to appeal to His Majesty in Council.

C. V. Ananthakrishna Iyer for petitioner.

B. Sitarama Rao for the respondent.

Spencer, Offg. C. J.

The Judgment of the Court was delivered by

Spencer, Officiating Chief Justice :—This is an application for leave to appeal to the Privy Council against an order passed by us in C. R. P. No. 423 of 1922 in which we refused to interfere in revision with the order of a Subordinate Court restoring to file a suit which had been first disposed of upon an alleged compromise between the parties.

Before we can certify that the case is a fit one for appeal to His Majesty in Council, we must be satisfied that the order passed by us was a final order within the meaning of S. 109 C. P. C. What is a "final order" has been defined in *Ramchand Manjimal* v. *Goverdhandoss Vishandas Ratanchand* (1) The Privy Council say that "an order is a final one if it finally disposes of the rights of the parties." A smilar interpretation of the word "final" has been adopted in *Sankar Bharati* v. *Narasimha Bharati* (2) where Shah, C. J. says that "a final

1. (1920) I L R 47 C 918. 2. (1922) I L R 47 B 106.

Brito v. Brito — Spencer, Offg. C. J.

order is one which decides a cardinal point in the suit and finally disposes of the rights of the parties." Crump, J., who sat with him, took the word "final" to mean "an order which puts an end to the litigation between the parties, or at all events disposes so substantially of the matters in issue between them as to leave merely subordinate or ancilliary matters for decision." An English case, *Croasdell and Cammel, Laird and Co. Ltd., In re* (3) has been quoted before us in which it was held that "an order passed by a Divisional Court setting aside an award made by an arbitrator on the ground of misconduct on the part of the arbitrator was not a final order but an interlocutory one which involved no determination of the rights of the parties as regards the matters which were in dispute in the arbitration." Applying those definitions to the case before us, let us see what is the result. The Court below restored the suit to file because it found as a result of an enquiry that the defendant caused the plaintiff to sign a compromise petition by fraud and undue influence. The matter came up to us because it was argued that the Subordinate Court had no power to make such an order under S. 151 C. P. C. We refused to interfere on the ground that the lower Court could have made such an order in the exercise of its powers of review and because the merits of the case would be finally enquired into at the trial which was to take place thereafter. Assuming that the lower Court's order refusing to act upon the compromise did in some way dispose of the rights of the parties, our order did not take away from or add anything to what the lower Court decided. We only decided the question of jurisdiction. The rights of the parties in the suit were left open for decision and have since been decided. We are therefore of opinion that our order was not a final order within the meaning of S. 109 C. P. C.

It is argued that, if the petitioner is not given leave to appeal against our order, he will be precluded from raising the contention that the matter has been settled by compromise and making that a ground of appeal against the final decree, and, in that connection, reference has been made to S. 105 which may also be read with S. 97 C. P. C., and to the right of a party to raise an issue in appealing against a final decree which he has not appealed against in appeal from the preliminary decree. The answer to that argument is found in *Venkataranga Rao* v. *Narasimha Rao* (4), where it was pointed out by Miller and

3. (1906) 2 K B 569. 4. (1913) I L R 38 M 509 : 26 M L J 96.

Brito v. Brito

Spencer, Offg. C. J.

Sadasiva Iyer, JJ., that S. 105 does not apply to appeals to His Majesty in Council and does not supply a guide to the interpretation of the word " final " in S. 109. In *Saratmani Debi* v. *Rada Krishna Banerjee* (5), Mookerjee, J., defined a " final order " as " one which finally decides any matter which is directly at issue in the case in respect of the rights of the parties." With due respect, we consider that this, as it stands, is a definition which cannot be quite reconvciled with the definition in I. L. R. 47 Cal. and I. L. R. 47 Bom., but as the learned Judge goes on to say that " the answer to the question whether the order is final or not must depend on whether it decides finally the cardinal point in the suit or an issue which goes to the foundation of the suit," there is no need to quarrel with his first definition. *Meghraj* v. *Bidyabati Koer* (6) and *Lachmi Narain Marwari* v. *Balmakund Marwari* (7) are both cases in which an order was passed setting aside a decree dismissing a suit for default. It is unnecessary to canvass the correctness of the view that such an order might be a final order, because the orders there passed do not in any way correspond to the order which we passed on the Revision Petition in this suit. Assuming that the subordinate Judge's order finally disposed of the rights of the parties to have their dispute settled by compromise and was thus a " final order " our order did no more than refuse to interfere with that order upon a question being raised as to the Subordinate Judge's jurisdiction to pass it.

Holding that the order passed by us was not a final order, we dismiss the present application with costs.

C. M. P. No. 2887 of 1923, which is a petition for stay of proceedings, is dismissed without costs.

A. S. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER *Officiating Chief Justice.*

Sunkari Sitayya *Appellant** (*2nd Defendant*).

v.

Mudaragaddi Sanyasi and another *Respondents* (*Plaintiff and 1st Defendant*).

Sunkari Sitayya *v* Mudaragaddi Sanyasi

Execution of decree—Attachment in—Property attached subject of contract for sale prior to attachment—Decree in suit for specific performance of contract for sale brought after attachment, and delivery of possession to contractee—Attaching creditor not made party to suit—Rights of attaching creditor and of vendee—Attachment if prevails against vendee's title—Remedy of attaching creditor in such a case.

Property, which the 1st defendant had contracted to sell to the 2nd, was attached by the plaintiff in execution of a money decree obtained by him against the 1st defendant. After the attachment, the 2nd defendant brought a suit for specific performance and got an order for sale from the Court and delivery of possession. He put in a claim to the property attached which was allowed. In a suit brought by the plaintiff to set aside the order on the claim petition, *held* that the attachment could not prevail against the 2nd defendant's decree by which he got possession of the property in pursuance of the contract for sale, though it was open to the plaintiff, who was not a party to the suit for specific performance, to impugn the decree therein as being based on fraud or collusion. The plaintiffs' proper course was to file a suit under S. 53 of the Transfer of Property Act to have the transfer avoided as being intended to delay or defeat creditors.

Second Appeal against the decree of the District Court of Vizagapatam in A. S. No. 140 of 1922 presented against the decree of the Court of the District Munsif of Vizagapatam in O. S. No. 575 of 1920.

C. Rama Rao for appellant.

Y. Suryanarayana for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff in execution of a money decree against the 1st defendant attached certain lands and a house and house site as belonging to his judgment debtor. That was on the 15th December 1918. Previous to this on 15th May 1916 there was a contract between the 1st defendant and the 2nd defendant to sell the same property to the 2nd defendant. After the attachment the 2nd defendant put in a claim petition which was allowed. The plaintiff thereupon brought this suit to set aside the order upon the claim petition, and it has been decreed by the first Court and

*S A No. 1591 of 1922. 11th January, 1924.

confirmed in appeal by the District Judge. After the attachment had been made, the 2nd defendant brought a suit for specific performance and got an order for sale from the Court and delivery of possession. The question raised in the second issue is whether the 1st defendant had any subsisting interest in the property which was attached, in other words, whether the attachment can prevail against the 2nd defendant's decree by which he got possession of the land in pursuance of the contract for sale. The Courts below held that the contract for sale did not create any title in the 2nd defendant and following the decision in *Kuri Veerareddi* v. *Kuri Bapi Reddi* (1) they set aside the order on the claim petition and declared that the properties were liable for attachment. The decision in *Kuri Veera Reddi* v. *Kuri Bapi Reddi* (1) is based on the last sentence of S. 54, Transfer of Property Act " It (a contract for the sale of immoveable property) does not, of itself create any interest in or charge on such property. " These words are capable of being understood in more senses than one. One implication therefor is that such contracts do not require registration. This decision has recently been overruled by a decision of a Full Bench in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddi* (2). The principle governing the present case has been stated in *Venkata Reddi* v. *Velappa Chetti* (3), where the learned Judges point out that in English Law a judgment-creditor has no rights as against a transferee of property in pursuance of a contract entered into before the attachment. They say that it does not seem to be sound sense that when a creditor attaches property which is subject to a particular obligation, he should be able to override it. This case has been referred to with approval, *Chamiyappa Taragan* v. *Rama Aiyar* (4). It is obvious that the plaintiff could by no manner of means attach a greater interest than what his judgment-debtor possessed at the date of attachment. The plaintiff cannot even lay claim to the rights of a *bona fide* purchaser without notice of prior obligations attached to the land purchased (S. 53 of the Transfer of Property Act) as in this case there has been no sale in open market. S. 64 of the Civil Procedure Code lays down that where an attachment has been made, any private transfer or delivery of the property attached is void as against all claims enforcible under the attachment.

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1. (1905) I L R 29 M 336.
2. (1923) 45 M L J 528 : 46 M 919 (F B).
3. (1916) 5 L W 234.
4. (1920) 40 M L J 65 at 76.

Sunkari Sitayya v Mudaragaddi Sanyasi

The 2nd defendant's title does not rest upon a private transfer but upon a decree of Court based on the contract to sell and is comparable to the case of a decree based upon an award which we held in *Kasi Viswanathan Chettiar* v. *Ramaswami Athitha Nadar* (5) which was followed in *Narayana Aiyar* v. *Biyari Bivi* (6), should prevail over a purchase under an attachment prior to the award.

The plaintiff in this suit was not a party to the suit for specific performance and it is open to him to impugn that decree as being based on fraud or collusion. His proper course would be to file a suit under S. 53 of the Transfer of Property Act to have the transfer avoided as being intended to defeat or delay creditors. In his plaint he has not put his case quite on that ground. But he has alleged that the contract of sale was invalid as being executed with the evil intention of avoiding the plaintiff's debts ; and the first issue in the suit raises the question whether the decree for specific performance was obtained fraudulently. As the Courts below have not decided this issue erroneously upon the preliminary point arising out of the second issue, their decrees must be set aside and the suit remanded to the District Munsif's Court for disposal upon the first and other issues as yet undecided. Costs of the second appeal and costs in the Courts below will be costs in the cause and abide the result. The Court-fee in Second Appeal may be refunded.

A. S. V. *Suit remanded.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Kidambi Tirumalacharyulu *alias*

Ramanujacharyulu and others. . *Appellants** (*Defendants*).

v.

Ammisetti Venkiah and others. *Respondents* (*Plaintiffs*).

Tirumalacharyulu *v.* Ammisetti Venkiah

Civil Procedure Code, O. 32, R. 3 (5)—Minor defendants—Guardian ad-litem—Appointment of Head Clerk of the Court—Omission of notice to person having custody of minors—Irregularity—Effect on decree.

No irregularity by way of an omission to send a notice as required by O. 32, R. 3 (5) of the C. P. Code will operate to render void the presumed representation of the minor in a suit by a guardian *ad litem* appointed for him, unless such an omission has in fact prejudiced his defence. Such prejudice is not a matter of assumption or presumption but of proof.

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*S A No. 843 of 1921. 6th February, 1924.

5. (1919) 35 M L J 441. 6. (1921) 41 M L J 557.

Tirumalacharyulu v. Ammisetti Venkiah

Consequently a decree pasesd in a prior suit against a minor represented by the Head Clerk of the Court as guardian *ad-litem* cannot be set aside in a fresh suit on the ground of want of notice of the appointment of the guardian *ad-litem* under O. 32, R. 3 (5), C. P. Code to the person having the custody of the minor, unless it is shown that the minor had a good defence to the suit which by the negligence of the Court guardian, whose appointment followed on the breach of the rule, had not been put forward.

Suresh Chander Waru Chowdhry v. *Jugent Chunder Pal* I L R 14 C 204 ; *Bhagwan Dayal* v. *Param Sukh Das* I L R 37 A 179 ; *Ramaswami Chetty* v. *Doraiswami* 44 M L J 299 relied on.

Appeal against the Decree of the District Court of Guntur in A. S. No. 307 of 1920 preferred against the Decree of the Court of the Principal District Munsif of Guntur in O. S. No. 173 of 1919.

B. Sitarama Rao for appellants.

N. Rama Rau for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs sued in this case to set aside the decree in O. S. No. 274 of 1917 on the file of the Principal District Munsif's Court, Guntur, obtaining against them when they were minors. They sued on the ground that they were not properly represented by the guardian in the suit and that the said guardian was guilty of gross negligence.

There is no doubt that they were minors at the time of the suit, and both their father and mother were dead. It is also clear that they had no certificated guardian and no natural guardian. It appears that the Plaintiff in O. S. No. 274 of 1917 first applied to the Court to have one K. Ramiah appointed as guardian *ad litem* and notice was sent to him but he refused to act. The plaintiff then applied for a Court guardian and the Head Clerk of the Court was appointed. The plaintiffs here in this case urged that the appointment of the Court guardian was illegal because no notice of the application to appoint a Court guardian was sent, as it should have been sent, under O. 32, R. 3 (5) to the person in whose care the minors were. The defence urged that, since plaintiffs were in the case of K. Ramiah who already had notice of the application to appoint himself as the guardian, it was not necessary to send a fresh notice to him. Plaintiffs rejoined that K. Ramiah was not the person in whose care then they were ; that they were in the care of R. Seetharamaswami, that, even if they were in Ramiah's care, it was necessary to serve him with a notice again in order to comply with the Rules, so that he might have had an opportunity of objecting to the appointment of the Court guardian or of proposing some other person as guardian ; and

that at least under the rules the Court should and could not have been satisfied, without sending a fresh notice to him, that there was no person fit and willing to act as guardian, which is the only condition on which the appointment of a Court guardian can stand. See O. 32 R. 4 (4).

The first Court found that the plaintiffs were not in the care of R. Seetharamaswami but it has not clearly found that they were in the care of K. Ramiah to whom notice under the rules did not go. Both the lower Courts have held that the mere omission to send such a notice is a sufficient ground in law for holding that the minors were not properly represented in the suit. I do not think that the law is so. The correct view, I think, is that no irregularity by way of an omission to send a notice as required by O. 32 R. (3) shall operate to render void the presumed representation of the minors in a suit, unless such an omission has in fact prejudiced their defence, and such prejudice is not a matter of assumption or presumption but of proof see *Suresh Chunder Waru Choudhry* v. *Jugut Chunder Pal* (1), *Bhagwan Dayal* v. *Param Sukh Das* (2) and in this Court the case reported in *Nachiappa Chetti* v. *Chinniah Ambalan* (3) and particularly in *Ramaswami Chetty* v. *Doraiswami* (4). The *ratio decidendi* in *Maruthamalai* v. *Palani* (5) is to the same effect. It is clear then that the lower Courts were not justified in setting aside the decree in O. S. No. 274 of 1917 without first considering the question whether in fact the minors had been prejudiced in their defence.

The answer to this question again will depend very much on the answer to the question whether the minors had a good defence which, by the negligence of the Court guardian, whose appointment followed on the breach of the rule, had not been put forward. In the present case it is clear that the Court guardian put forward no defence, did not file a written statement and did not supply the vakil for the minors with any material on which to cross examine the plaintiff's witnesses in that suit. So, the points to be settled are whether the minors had a good defence and whether the omission to obey the rules had the effect of shutting out that defence. These points are embodied, not as clearly as they might have been perhaps in issues II, III and IV framed by the first Court. The appellants argued that the plaintiffs put forward no evidence on these issues, and therefore they must be found against them the onus lying on them ;

1. I L R 14 C 204. 2. (1915) I L R 37 A 179.
3. (1916) 4 L W 362. 4. (1923) 44 M L J 299. 5. (1912) I L R 37 M 535.

Tirumala-charyulu v. Ammisetti Venkiah

but, on my reading of the first Court's judgment, I am forced to the conclusion that the first Court refused to go into these issues, holding that its finding on the first issue was enough to dispose of the suit, and the lower appellate Court never touched on these points at all. I must hold therefore that these issues are still to be tried. I therefore reverse the decision of the lower appellate Court and direct the suit go back to the first Court and be reheard there on the other issues in the light of this judgment. Fresh evidence is of course admissible. Costs up to date will abide the result.

A. V. V. *Appeal allowed and case sent back.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C. *Chief Justice.*

Kandaswami Naidu *Appellant** (*1st Defendant*)

v.

M. Kanniah Naidu and others *Respondents* (*Plaintiffs and 2nd Defendant*).

Kandaswami Naidu v. Kanniah Naidu

Damages—Breach of promise of marriage—Measure of damages—Exaggerated claim—Costs.

The defendant agreed to give his daughter in marriage to the second plaintiff, the brother of the first plaintiff, but eventually got her married to a third person. In an action for damages for breach of promise of marriage, *held*, that the plaintiffs were entitled to recover money actually thrown away and also damages to credit and reputation by reason of the refusal.

Umed Kika v. *Nagindas Narotamdas* 7 B H C R 122 followed.

Khimji Vassonji v. *Narsi Dhanji* I L R 39 Bom. 682, 714 not followed.

Where the Court finds that the plaintiffs have grossly and intentionally exaggerated their claim for damages and decrees only a small portion of the claim, the defendants are liable to pay only a proportionate share of the Court-fees paid by plaintiffs.

Appeal against the decree of the City Civil Court, Madras, dated 24th August 1922, in O. S. No. 702 of 1921.

P. G. Krishna Aiyar for appellant.
V Visvanatha Sastri for respondent.

The Court delivered the following

JUDGMENT :—This is an appeal from the City Civil Court in an action for breach of promise of marriage. The action is not by either of the parties proposed for the marriage but

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*C C C Appeal No. 1 of 1923. 11th December, 1923.

Kandaswami Naidu v. Kainnah Naidu

mainly by the brother of the proposed bridegroom against the father of the proposed bride. The contract was proved under which the first defendant agreed to give his daughter in marriage to the 2nd plaintiff who is 1st plaintiff's brother. It is well established that on breach of such a contract an action for damages lies. The Mitakshara itself provides that, if a more suitable suitor is found, a man will be justified in breaking off a marriage contract but I think that it is quite clear that, when that course is pursued, it is also provided that some form of damages can be provided against the father who so changes his mind. This is stated to be the law in *Umed Kika* v. *Nagindas Narotamdas* (1). There is a passage to the contrary in a decision of Beaman, J., in *Khimji Vassonji* v. *Narsi Dhanji* (2), which I think, is inaccurate and is based, as pointed out in Mayne's Hindu Law at page 118, on a misconception of Mitakshara. *Umed Kika* v. *Nagindas Narotamdas* (1) is authority for the proposition that, in such cases, the plaintiff is entitled to recover money actually thrown away and also damages to his credit and reputation by reason of the refusal. I should have myself felt a little doubtful as regards the second head of damages though this kind of damages is allowed in the well-known English form of action for breach of promise of marriage and allowed to the plaintiff concerned who is actually a party to the marriage contract but not to the parents ; but I see no reason for saying that the decision in 7 Bom. H. C. R. to which that learned Chief Justice Westropp was a party is wrong. Under the circumstances the learned Judge awarded in this case Rs. 50 as damages under that head and also Rs. 200 for damages actually sustained. The claim had been preferred for a very much larger amount. The learned Judge discounted the claim and disallowed a large part of the damages claimed on the ground that the plaintiffs had intentionally aggravated the damages by spending money, though they knew that the marriage would not take place ; and he reduced, I think, the amount to what he considered to be the actual minimum amount expended by the plaintiffs without knowing of the other marriage. I must say that I am not certain that he has not from that point of view given a little too much, but to some extent it had to be a guess work, and I think he has given if anything a little too little on the other head. I think that it will not be right to interfere with the amount of damages he

1. 7 B H C R 122. 2. I L R 39 B 682, 714.

Kandaswami Naidu v. Канniah Naidu

has awarded in this case. But I do not think he was right in awarding the full costs that he awarded. The claim was for Rs. 2,000 and a stamp had been paid on the plaint of Rs. 125 based on the valuation and the learned Judge found that the case for the plaintiffs was grossly exaggerated and intentionally exaggerated. I do not think that it is right, when a Judge adopts that view of the case, to award costs on a scale which includes the amount paid as tax to Government based on the larger amount which had been falsely put forward. I do not think that the amount allowed as vakil's fees was at all excessive in view of the case but I think that the amount recoverable for stamp must be reduced to its proper amount, namely, Rs. 18-12-0. This appeal has substantially failed and has succeeded on this minor point. I think that the result must be that there will be no order as to the costs of this appeal.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Krishna Iyer ... *Appellants* in A. A. O. No. 69 of 1923 and Petitioner in C. R. P. No. 211 of 1923 (Petitioner-Plaintiff).*

v.

Subramania Iyer and another ... *Respondents in both (Respondents).*

Krishna Iyer v. Subramania Iyer

Civil Procedure Code, O. 1, R. 10 and O. 22, R. 10—Mortage suit—Preliminary decree—Addition of parties.

It is competent to the Court to add a person interested in the equity of redemption as a party to a suit on a mortgage even after the passing of the preliminary decree therein and to re-open the prior proceedings so far as he is concerned.

Keith v. *Butcher* 25 Ch D 750 followed.

Raghunath v. *Sheolal,* 31 I C 849 dissented from.

Appeal against and petition to revise the order dated the 27th day of January 1923, of the Court of the Subordinate Judge of Mayavaram in Interlocutory Application No. 187 of 1922 in O. S. No. 113 of 1921.

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*A A O No. 69 of 1923 and
C R P No. 211 of 1923.

24th January, 1924.

Krishna Iyer v Subramania Iyer

K. V. Krishnaswami Aiyar and *K. Narasimha Aiyangar* for appellant.

T. R. Ramachandra Aiyar and *S. Panchapagesa Aiyar* for respondents.

The Judgment of the Court was delivered by

Phillips, J., :—This appeal is against the order of the Subordinate Judge of Mayavaram refusing to add the two respondents as parties after the preliminary decree in a mortgage suit brought by the plaintiff had been passed and before the final decree. A portion of the mortgaged property had been attached by the 2nd respondent and was brought to sale by him on the 18th of July 1921. A portion of the properties was purchased on that date by the 1st respondent, but the sale was not confirmed until December 1921. In the meanwhile, in November 1921 the plaintiff brought his suit. Some other properties which had been sold in july had been purchased by a third party, but that sale was set aside because the balance of purchase money was not paid and they were again brought to sale in March 1922 when they were purchased by the 2nd respondent. As those persons are interested in the mortgaged property, the plaintiff sought to add them as party defendants to his suit before he obtained the final decree. So far as the 2nd respondent is concerned, it is perfectly clear that he purchased the property during the pendency of the plaintiff's suit and, consequently the provisions. of O. 32, R. 10 are applicable in his case. Under that rule he can be added as a party at any time during the pendency of the suit and inasmuch as he has purchased the mortgagor's interest in a portion of the property, it is certainly desirable that he should be added, for having purchased *pendente lite* he has become subject to all the liabilities of the mortgagor and consequently can raise no defence to this suit which the mortgagor could not raise.

The case is somewhat different as regards the 1st respondent. He undoubtedly purchased the property before the suit was filed ; but inasmuch as his sale was not confirmed until after the filing of the suit, the plaintiff could not make him a party, because he would have been met with the objection that this respondent had not at that time any interest in the land ; but inasmuch as the creation of the interest dated back to July and the only action taken by the respondent in order to create that interest was the making of his bid in July 1921, his interest must be deemed to have been created before the suit was filed. O. 22, R. 10 is, therefore, not applicable in his case. We are then asked by the appellant

Krishna Iyer v. Subramania Iyer

to apply the provisions of O. 1, R. 10 and in the exercise of our discretion to add him as a party defendant in order to avoid the necessity of filing a fresh suit against him. The learned Subordinate Judge declined to make him a party relying on a decision of the Additional Judicial Commissioner of Nagpur *Raghunath* v. *Sheolal* (1), in which it was held that it was not competent to add parties after a preliminary decree. We have, however, the authority of *Keith* v. *Butcher* (2) for holding that even after a Judgment had been pronounced in an action for foreclosure, a party was allowed to be added before the Judgment had actually been drawn up and entered. That would appear to be a somewhat stronger case than the present one. No doubt in the present case as the 1st respondent had no opportunity of meeting the plaintiff's case in its earlier stages, it would not be fair to implead him as a party and make him liable to the preliminary decree already passed without giving him an opportunity of meeting it. On the other hand, it is open to the Court to add a party and allow the prior proceedings to be re-opened so far as he is concerned and we are now asked to allow this to be done rather than drive the plaintiff to another suit. There are circumstances in this case which seem to render the former course desirable. The 1st respondent has purchased this property subject to the mortgage and in the sale proclamation the mortgage was practically admitted by the decree-holder. This statement by the decree-holder is not binding on the 1st respondent, but he may be given an opportunity now of proving that the mortgage was not valid so far as his property is concerned. On this condition we direct that he also be added as a defendant.

As the appellant has succeeded entirely so far as the 2nd respondent is concerned, the 2nd respondent will pay half the plaintiff's costs in the appeal. The 1st respondent will bear his own costs.

A preliminary objection was raised that no appeal would lie against the Subordinate Judge's order, but so far as the order relates to the 2nd respondent, the appeal would lie under O. 22, R. 10 ; but inasmuch as that rule is not applicable to the 1st respondent, the appeal would not lie under O. 1, R. 10; but as the order is one and the same, we will deal with the case so far as the 1st respondent is concerned in the Revision Petition, which has also been filed. There will be no costs in the Revision Petition.

A. V. V *Appeal allowed.*

1. (1917) 39 I C 849. 2. 25 Ch D 750.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM.

Chemalapati Venkata Reddy *Petitioner** (*Plaintiff*)

v.

Nataraja Setti and another *Respondents* (*Defendants* 2 *and* 3).

Venkata Reddy *v.* Nataraja Setti.

Civil Procedure Code (*Act V of* 1908), *S.* 20—*Commission Agent—Suit to recover price of goods entrusted to—Cause of action—Jurisdiction—Offer—Acceptance—Money intended to be paid to principal—Places of—Jurisdiction of Court at.*

The plaintiff, a permanent resident of a place within the jurisdiction of the District Munsif's Court of M, went to Madras where he and the defendant talked and settled about the commission to be paid to him. He told defendant in Madras that he would consign goods directly to him or to others who would be directed to deliver to him. Plaintiff sent goods to a firm at Madras with instructions to deliver them to the defendant. He also wrote to the defendant asking him to sell them and send the amount. The firm delivered the goods to the defendant, who wrote to the plaintiff stating that he would send the amount after selling the goods.

In a suit instituted by the plaintiff in the Munsif's Court of M to recover the price of the goods delivered to defendant as commission agent on behalf of plaintiff, *held* that the money was intended to be paid to the plaintiff at his native palce, that part of the cause of action therefore arose within the jurisdiction of Court M, and that that Court had jurisdiction to try the suit.

The making of an offer may be part of the cause of action, but this means not the posting of the offer but the receipt of the offer.

The receipt of the acceptance when the contract is complete is a part of the contract.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act praying the High Court to revise the decree of the District Court of Chittoor in Mis. Appeal No. 3 of 1920, presented against the order of the Court of the District Munsif of Madanapalle dated 19th September, 1919 and made in O. S. No. 404 of 1918.

B. Somayya for petitioner.

K. Rajah Iyer for respondent.

The Court delivered the following

Judgment :—The plaintiff is the petitioner before me. The suit was brought in the District Munsif's Court of Madanapalle to recover Rs. 316-5-2 in respect of 9 bags of jaggery delivered to defendant as commission agent on behalf of plaintiff. The District Munsif and the District Judge held that the Madanapalle Court had no jurisdiction. Hence this petition.

*C R P No. 643 of 1921. 16th January, 1924.

Venkata Reddy v. Nataraja Setti.

Six or seven years prior to the plaint, the plaintiff went to Madras where he and the defendant "talked and settled about the commission to be paid to him." He told 1st defendant in Madras that he would consign goods directly to him or to others who would be directed to deliver goods to him. The defendant was afterwards writing letters to plaintiff informing the latter of the current prices prevailing in Madras and suggesting the despatch of goods. In October, 1915 plaintiff sent 18 bags of jaggery to P. S. Abdul Khader Saheb and Brothers at Madras with instructions to deliver 9 of them to the defendant. He also wrote to the defendant asking him to sell them and send the amount. Abdul Khader delivered the bags on 25—10—15 to defendant. On 5—12—15 (Ex. 17) defendant wrote stating that he would send the amount after selling the jaggery. On these facts the Courts below held that the Court of Madanapalle had no jurisdiction.

Of the cases relied on by the respondent *Jivaraju* v. *Purushotam* (1) was not decided with reference to S. 17 of the Code of 1882 as amended in 1888. In *Kamisetti Subbiah* v. *Katha Venkatasamy* (2) [citing *Newcomb* v. *De Ross* (3)] where the facts are somewhat similar, it was held that the cause of action did not arise in Kurnool but in Madras, the *ratio decidendi* being that the contract was made at the place where the letter of acceptance was posted. *Taylor* v. *Jones* (4) also cited in it was a case in which the facts were peculiar. There though a letter of offer was posted in London no reply accepting it was posted but the goods were delivered in London and obviously the contract came into existence wholly in London. It is true that the making of an offer may be part of the cause of action [see *Borthwick* v. *Walton* (5) and *Green* v. *Beach* (6) cited in *Appu Thamban* v. *Foulkes* (7)] but this means not the posting of the offer but the receipt of the offer [see *Mylappa Chettiar* v. *Aga Mirza Mohammad Shirazee* (8) citing *Clark Brothers* v. *Knowles* (9)]. In this case, the plaintiff's offer does not help him. But the receipt of the acceptance when the contract is complete is a part of the contract—there being no reason why acceptance should be in a worse position than offer. The English cases in *Newcomb* v. *De Ross* (3) and *Borthwick* v. *Walton* (5) are cases under

1. (1883) I L R 7 M 171.
2. (1903) I L R 27 M 355.
3. (1859) 2 E & E 271.
4. (1875) 1 C P D 87.
5. 15 C B 501.
6. L R 8 Exch 208.
7. (1919) 10 L W 445.
8. (1919) 37 M L J 712.
9. (1918) 1 K B 128.

Venkata Reddy v. Nataraja Setti.

the then County Courts Act, 9 and 10 Vic., c. 60 according to which the whole cause of action must arise within the jurisdiction of the County Courts. No doubt the later case *Clark Brothers* v. *Knowles* (9) arose on the later County Courts Act 51 and 52 Vic. 43 under which it is enough if part of the cause of action arose within the jurisdiction of the County Court. But it does not appear from the affidavit upon which the application was based that any letter of acceptance was received at West Hartlepool. If it can be said on the facts of *Mylappa Chettiar* v.*Aga Mirza Mohammad Shirazee* (8) that the defendant's acceptance of plaintiff's offer was ultimately communicated to plaintiff at Negapatam, then the correctness of the decision is doubtful. Nor was any attempt made in the case in *Kamisetti Subbiah* v. *Katha Venkatasamy* (2) to support the Judgment under appeal on the ground that a letter of acceptance was received in Kurnool. But, apart from this ground, it is clear that in this case the money was intended to be paid to the plaintiff at his native place [see *Naina Maracayar* v. *Somasundaram Chettiar* (10), *Robey* v. *Snacfell Mining Company* (11) and *Bangali Mal* v. *Ganga Ram* (12)] and if so, part of the cause of action arose within the jurisdiction of Madanapalle Court. The contract in *Comber* v. *Layland* (13) is special and peculiar as pointed out in *Naina Maracayar* v. *Somasundaram Chettiar* (10). On both the grounds above indicated, I reverse the order of the Courts below and direct that the suit be taken on file and disposed of according to law. The respondents must bear the costs of this petitioner in this Court and in the lower appellate Court. The costs in the first Court will abide the result.

A. S. V. *Reversed and remanded.*

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9. (1918) 1 K B 128.
8. 37 M L J 712.
2. (1903) I L R 27 M 355.
10. (1920) 11 L W 593.
11. (1878) 20 Q B 152.
12. 71 I C 431.
13. (1898) A C 524.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Immudipattam Janakirama Kumara Kondama Subramania Nachimuthu Bommayya Naicken Ayyan Avergal *Appellant** (*3rd Counter Petitioner*).

v.

C. Subramania Iyer *Respondent* (*Petitioner*)

Immudipattam Bommayya Naicken Ayyan *v.* Subramania Iyer.

Legal representative—Assets of deceased in hands of—Impartible estate—Decree for money against predecessor—Execution against money payable under a lease granted by predecessor but for period subsequent to his death—Money if assets in hands of successor—Succession to estate by survivorship—Madras Impartible Estates Act, S. 4—Debt borrowed by holder for benefit of estate—Recovery from successor—Procedure—Execution of decree or separate suit—Execution Petition—Conversion into suit—Conditions.

In execution of a decree for money obtained against a previous Zamindar of Ayakudi, plaintiff applied for attachment of certain sums of money payable to the succeding Zamindar under a lease which was granted by the previous Zamindar, but for a period subsequent to his death. The decree was sought to be executed against the succeeding Zamindar as the legal representative of his predecessor against the assets in his hands.

Held, that the money sought to be attached could not be considered to be the assets of the late Zamindar at all, for it was money that had accrued due after the late Zamindar's death and after the estate had passed into the hands of his successor by survivorship.

If the judgment-creditor was able to show that his debt was for a sum of money borrowed for the benefit of the estate, under S. 4 of the Madras Impartible Estates Act, his debt would be a debt binding on the impartible estate and he would be entitled to enforce his debt as against the estate in the hands of the succeeding Zamindar. Even then the Zamindari would not become the assets of the late Zamindar in the hands of his successor, and the proper remedy of the plaintiff would be to bring a suit, and, after obtaining a declaration that his debt was binding on the impartible estate and upon the income that had accrued due from the impartible estate in the hands of the successor, to apply then in execution of his decree to have it executed against such property.

The learned Judges declined, in the circumstances of the case, to convert the execution petition into such a suit.

Appeal against the Order of the Court of the Subordinate Judge of Dindigul dated the 6th July 1922 in A. S. No. 90 of 1921 preferred against the Order of the Court of the District Munsif of Palani dated the 30th September 1921 in E. P. No. 96 of 1921 in (O. S. No. 714 of 1911 on the file of the Court of the Principal District Munsif of Dindigul.)

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*A A O No. 330 of 1922. 3rd December, 1923.

B. Sitarama Rao and *S. R. Muthuswamy Aiyar* for appellant.

T S. Ramaswamy Iyer and *V. Sundaram Iyer* for respondent.

The Judgment of the Court was delivered by

KRISHNAN, J. :—In this case the question arises in the execution of the Decree in O. S. No. 714 of 1911 on the file of the principal District Munsif of Dindigul. The plaintiff obtained a decree against the then Zemindar of Ayakudi for a certain sum of money. That Zemindar died in 1917 and this is an application made by the plaintiff for attachment of certain sums of money payable to the present Zamindar under a lease which was granted by the previous Zamindar who was the judgment debtor, but for a period subsequent to the death of that Zamindar. The decree is sought to be executed against the present Zamindar as the legal representative of the late Zamindar against the assets in his hands. The present Zamindar objected to the attachment and contended that this money could not be treated as assets in his hands as it was his own money and further more that the matter could not be gone into in execution. The Munsif gave effect to the plea that the matter could not be gon into in execution and referred the plaintiff to a suit, but, on appeal to the appellate Court, the learned Subordinate Judge held that the matter should be decided in execution proceedings and has remanded the application to the lower Court for disposal on the merits. The appeal to us is by the present Zamindar who contends that the order of the lower appellate Court is not right.

It is clear to us that the money that has been attempted to be attached in this case cannot be considered to be the assets of the late Zamindar at all, for it is money that has accrued due, under the lease of the Zamindar, after the late Zamindar's death and after the estate had passed into the hands of the present Zamindar by right of survivorship. It is true that, if the plaintiff (judgment creditor) is able to show that his debt was for a sum of money borrowed for the benefit of the estate, under S. 4 of the Impartible Estates Act, his debt would be a debt binding on the impartible estate and he would be entitled to enforce his debt as against the estate in the hands of the present Zamindar ; but, by proving that the debt was borrowed for the benefit of the Zamindari, the Zamindari does not become the assets of the late Zamindar in the hands of the present

Immudipattam Bommayya Naicken Ayyan v. Subramania Iyer.

Zamindar. The only thing that results is whether the plaintiff will be able to enforce his debt against the impartible estate in the hands of the present Zamindar.

We think that such a question could not be decided in execution proceedings. The view of the Subordinate Judge that the question is one of determining what are the assets of the late Zamindar is not correct. The question is one of enforcing a new liability that would be created against the estate in the present Zamindar's hands by proof that the debt was borrowed for the benefit of the estate. The plaintiff's proper remedy is to bring a suit, and, after obtaining a declaration that his debt is binding on the impartible estate and upon the income that has accrued due from the impartible estate in the hands of the present Zamindar, to apply then in execution of his decree to have it executed against such property.

An application has been made to us that the execution petition should itself be converted into such a suit and that the respondent (judgment-creditor) should be allowed to go on with his execution application amended into a suit. We think that this cannot properly be done, for what he is applying for in the present application is to attach certain monies as being the assets of the late Zamindar, and after attachment of such monies, to pay them over to him in satisfaction of his decree debt. In a suit such a prayer as that of attachment of monies, cannot be included. He will have, after obtaining a declaration if he can that these monies are liable for his decree debt, to put in a fresh application for attachment and payment of those monies in satisfaction of his decree debt.

The Order of the lower Court must therefore be reversed and that of the District Munsif must be restored. The appellant will have his costs of this appeal but we do not interfere with the orders as to the rest of the costs.

A. S. V. *Order set aside.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Karakkattidathil Ryrappan Nambiyar *Appellant** (*Plff.*)

v.

Kalliayatt Thazhathveetil Chathu Kutti Nambiyar *Respondent* (*Defendant*).

Ryrappan Nambiyar *v.* Chathu Kutti Nambiyar

Court Fees Act, S. 7, Cls. 1, 4 (e) and 11 (f)—Suit for declaration of plaintiff's liability to make a smaller periodical payment than that claimed by defendant—Valuation for purposes of Court Fees and jurisdiction—Achu Palisha *nature of.*

A suit for a declaration that the plaintiff is liable to pay *achu palisha* (a kind of royalty payable to a hill owner) only at the rate of 150 seers of paddy per annum and not at the rate of 359 and odd seers as claimed by the defendant, does not fall under S. 7, Cl. (1) or Cl. (4) (*e*) or Cl. (11) (*f*) of the Court Fees Act. The suit is one for a declaratory decree without any consequential relief and its jurisdictional value cannot be higher than the value of the subject-matter in dispute between the parties. The subject-matter in dispute is the difference between what the plaintiff admits to be the proper rate and the rate alleged to be claimed by the defendant. The declaration which the plaintiff seeks, if allowed, would relieve him from the liability to pay the difference between these two sums for all time, and therefore in estimating the value of the subject-matter in dispute the Court must take the capitalised value of that right.

Appeal against the order of the Court of the Subordinate Judge of Tellicherry, dated 13th July, 1921 in O. S. No. 44 of 1920.

K. Govinda Marar for appellant.

V P. Karunakaran Nambiar for respondent.

The Court delivered the following

Krishnan, J.

JUDGMENTS :—*Krishnan, J.* :—This is an appeal against an order of the Subordinate Judge of Tellicherry returning the plaint filed in his Court in O. S. No. 44 of 1920 for presentation to the proper Court. The Subordinate Judge held that the suit was designedly over-valued in order to bring it within his jurisdiction and that, if properly valued, it fell within the jurisdiction of the District Munsif. The suit was for a declaration that the plaintiff was liable to pay *Achu palisha*, only at the rate of 150 seers of paddy per annum in respect of the plaint-mentioned 5 1|2 hills, and that he was not liable to pay 359 3|8 seers of paddy which the defendant was claiming. What the origin of this liability to pay *Achu palisha* is not

*A A O No. 9 of 1922. 5th December, 1923.

Ryrappan Nambiyar v. Chathu Kutti Nambiyar

Krishnan, J

stated but the liability itself is admitted. It would seem from the plaint that the total 509 3|8 seers of paddy is charged upon 16 hills of which the plaintiff has become the owner of 5 ½ hills, the defendant apparently being now the owner of some of the other hills. The defendant's right to this *Achu palisha* is not based upon his ownership of any property, but it is conceded that the defendant in his capacity as the head of his Kalliatt Thazhatha Veedu tarwad and as Uralan of Kalliatt Vayathur Kalias Devaswam is entitled to be paid *Achu palisha* by everyone who is the owner or jenmi of the hills in question. The Subordinate Judge treated the suit as one falling under S. 7, cl. 11, sub-cl. (*f*) of the Court Fees Act as a suit for abatement of rent, and applying the Suits Valuation Act he estimated the jurisdiction value at the value of the amount of the rent payable for a year. Thus valued he held the suit was for a sum far below the maximum amount fixed for the jurisdiction of the District Munsif and directed the plaint to be returned. This view of the Subordinate Judge can hardly be, and has not been attempted to be, supported, as cl. 11 applies only to suits between the landlord and tenant. It is impossible to say that there is any such relationship between the plaintiff and the defendant in this case. The plaintiff is the full owner or jenmi of the 5 1|2 hills he claims, and whatever the exact nature of *Achu palisha* may be, it is not rent. It seems to be some kind of royalty that is payable to the defendant's family from these hills.

It was attempted by the plaintiff to bring the case under S. 7, cl. 4 (*e*) as a suit for a right to some benefit which will arise out of land. We do not think that the suit can well be considered as falling under that clause either, for there is no benefit involved in this case arising out of land in favour of the plaintiff. If there is any benefit at all it is one that goes to the defendant and the clause refers to a suit *for a right to some benefit*. The Subordinate Judge was, therefore, right in overruling that contention.

It was further contended before us by the defendant-respondent that the suit may be held to fall under S. 7, cl. (1) as one for money or other sums payable periodically. Here again the argument fails. The suit by the plaintiff does not claim any sum of money at all. *Shazadi Begum* v. *Mahbub Ali Shah* (1), cited by the defendant is thus clearly distinguishable as that was for a sum of money payable to the plaintiff.

1. (1920) I L R 42 A 353.

Kyrappan Nambiyar v. Chathu Kutti Nambiyar

Krishnan, J.

After careful consideration we have come to the conclusion that this is a suit for a declaratory decree without any consequential relief. What the plaintiff really prays for is that the Court should declare that he is liable to pay only 150 seers of paddy as *Achu palisha* on a proper apportionment of the total amount payable on all the hills. The question thus is how is such a suit as that to be valued for purposes of jurisdiction? The Suits Valuation Act does not help us to settle this question. But we have come to the conclusion that in a suit for a declaratory decree the jurisdiction value cannot be held to be higher than the value of the subject-matter in dispute between the parties. This was the view taken in *Ganapati* v. *Chathu* (2) and we adopt that view and hold that the jurisdiction value of this suit must be determined by the value to be put upon the subject-matter in dispute in this suit. The subject-matter in dispute here is the difference between what the plaintiff admits is a proper charge on his property and the amount he says the defendant is insisting upon being paid, namely, the difference between 150 seers and 359 3|8 seers. That comes to 209 3|8 seers of paddy a year. The declaration which the plaintiff seeks, if allowed to him, will relieve him from the liability to pay the difference between these two sums for all time, and, therefore, in estimating the value of the subject-matter in dispute we think we must take the capitalised value of that right. Assuming that 5 seers of paddy is worth a rupee, which is itself a high commutation rate, and assuming that 20 years' purchase or even 25 years' purchase is the capitalised value of the yearly payment, the total value of the subject-matter would not come to more than about Rs. 1,000. In this view the case would clearly fall within the jurisdiction of the District Munsif. It was not open to the plaintiff to put the jurisdiction value at Rs. 5,000 so as to bring it within the cognizance of the Subordinate Judge apparently with the object of defeating the plea of *res judicata* by the defendant. In the result, we uphold the order of the Subordinate Judge though not for the reasons given by him and dismiss the Civil Miscellaneous Appeal with costs.

Waller, J. :—I agree.

A. V V. *Appeal dismissed.*

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2. (1889) I L R 12 M 223.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Sreekanta Sundararamiah and others ... *Appellants** (*Defendants* 1 *to* 5, 7, 8 *and L. R. of the deceased* 8*th defendant*)

v.

Tadikamalla Venkatasubbiah and others ... *Respondents* (*Plaintiffs and L. Rs. of the deceased 6th defendant*).

Sreekanta Sundararamiah v. Venkatasubbiah

Madras Estates Land Act, Ss. 5 *and* 125—*Sale of ryot's holding for arrears of rent—Effect on prior encumbrance—Mortgage created after the Act in renewal of a prior mortgage before the Act—Decree on mortgage—Rights of purchaser at execution sale.*

A ryot's holding had been mortgaged by him in 1897 and for a portion of the amount due under that mortgage he executed a fresh mortgage of the holding in 1909 after the Madras Estates Land Act came into force. In execution of a decree for sale on the later mortgage the palintiffs purchased the holding. In the meanwhile the landlord had brought the holding to sale in execution of a decree for arrears of rent and the holding was purchased by the defendants. On a question arising as to the rights of the two rival purchasers, *held* that the plaintiffs' purchase prevailed.

A mortgagee by taking a further security for his money that is charged upon land, cannot be taken to have intended to give up his under the earlier deed. The plaintiffs in the present case could rely on the rights under the earlier mortgage as against the defendants whose rights must, under S. 125 of the Madras Estates Land Act, be treated as subject to those rights.

Shankar Sarup v. *Mejo Mal* 23 A. 313 relied on.

Second appeal against the decree of the Court of the Subordinate Judge of Nellore in A. S. No. 63 of 1920 (A. S. No. 176 of 1919, District Court, Nellore), preferred against the decree of the Court of the District Munsif of Kanigiri in O. S. No. 502 of 1917.

A. Krishnaswami Aiyar and *K. Balasubramania Aiyar* for appellants.

M. Patanjali Sastri for respondents.

The Court delivered the following

JUDGMENT :—In this suit the competition is between the purchasers of the plaint property in execution of a mortgage decree obtained by the plaintiffs and the purchasers in a rent sale in execution of a rent decree which the Zamindar had

*Second Appeal No. 1163 of 1921. 9th January 1924.

obtained against the pattadar of the lands in question. The father of the plaintiffs had obtained on this property a mortgage in 1897 evidenced by Ex. A. In 1909 the amount due under that mortgage came to about Rs. 508 and a new mortgage was then taken for a part of it Rs. 300 which was the principal of the old mortgage, and that deed is Ex. B. That deed was executed, as is evidenced by its date, after the passing of the Estates Land Act. That deed says that it is taken for Rs. 300 due under the previous deed, and there is a statement that Rs. 208 are still due under the old deed. The plaintiffs brought a suit on the second of these deeds, Ex. B, and obtained a decree and brought the property to sale and purchased it themselves. But before they did that, the Zamindar, as already stated, obtained a decree in the Revenue Court (the Judgment in which case is Ex. K) and had the properties brought to sale and purchased some of the properties himself, and the other properties were purchased by the other defendants.

The question that has been argued in this case is as to whether the plaintiffs' purchase prevails, or whether it is the purchase of the defendants that prevail. Under S. 5 of the Estates Land Act, the landholder gets for his rent a first charge on the holding, but this is subject to S. 125 of that Act, which says, "When a holding or part of a holding is sold for arrears due in respect thereof, the purchaser shall take, subject to any right or interest which the ryot has created therein with the landholder's permission in writing registered and subject also to any encumbrance created before the passing of this Act." The contention of the respondents before me is that the encumbrance under Ex. A having been created before the passing of the Act, although they brought the suit on Ex. B, they must be allowed to fall back upon their rights under Ex. A and use those rights as against the defendants, whose charge should, therefore, be treated as subject to the rights of the plaintiffs. On the other hand, it is contended that the plaintiffs having taken Ex. B in 1909, which was after the passing of the Act, any rights which they had under Ex. A, except as regards Rs. 208 still reserved under it, had become extinguished, and that, as the suit was for the enforcement of the Rs. 300 included in Ex. B, it must be held that their sale was not for any encumbrance created before the Act, but, it was for an encumbrance created after the Act and as there was no permission of the

Sreekanta Sundara ramiah v. Venkata subbiah

Krishnan, J.

landholder to create such encumbrance, their (defendants') first charge should prevail. This I think, overlooks the principle that a man by taking a further security for his money that is charged upon land, does not, and cannot be taken thereby to have intended to, give up his rights under earlier deed which he had. A case very similar to this case was considered by the Privy Council in *Shankar Sarup* v. *Mejo Mal* (1). There there was a first mortgage in May 1883 to the plaintiffs for Rs. 15,000 and odd. Then in June 1883, there was another mortgage in favour of the defendant. Then again in November 1883, the plaintiffs took a third deed over the same properties including a further sum of money for a total of Rs. 20,000. The property was sold in Court auction and the question arose as between the defendant and the plaintiffs as to who had priority for payment out of the sale proceeds It was held by the Privy Council that, although the mortgage on which the suit was brought was the mortgage of November 1883, that is, the third mortgage, still the plaintiffs could not be taken to have abandoned their rights under the first mortgage and that they were entitled to use those rights as against the second mortgage and claim priority and to have their amounts paid in the first instance. It seems to me that that case really covers this case.

Some confusion was introduced into this case by reference to rights of subrogation. I do not think any question of subrogation arises in this case at all, because the second document, Ex. B, was taken by the same person who had the rights under the first document, Ex. A. Subrogation rights can only arise when persons pay off debts charged upon the land in favour of third parties. It is difficult to understand how such a question can arise except in a case where a person claims to stand in the shoes of the person who had the original right as against any mesne encumbrancers. Here no such question arises, because the document Ex. B was for a sum of money which was due under Ex. A and only created a further security of making one more person liable under it than was originally liable. No new properties have been added, or new debts created either. In these circumstances, I think that the principle clearly applies and that the plaintiffs, who were the persons entitled to the rights under Ex. A, are entitled to rely upon those rights as against the defendants, whose rights must, under

1. (1901) I L R 23 A 313.

S. 125, be treated as subject to their rights. Taking this view, I do not think it necessary to consider the other points in the case.

I would, therefore, dismiss the second appeal with costs.

A. V. V *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Rallabandy Venkataratnam and others *Appellants* (Petitioners).*

v.

Yanamandra Satyavati and others *Respondents (Respontents 1 to 4).*

Resjudicata —Will—Probate Proceeding—Order after contest in—Binding character of—Grant of Probate —Effect —Revocation for "just cause" under S. 50 of Probate and Administration Act —Party having opportunity of putting forward particular just cause but omitting to do so—Right to apply for revocation of—Effect on —Absence of special citation to him—Effect —Application by another party for revocation—Party already defeated if can avail himself of—Decree obtained by fraud—Setting aside by mere petition—Permissibility.

Any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it. The grant of probate by a competent Court is, on the general principle of the Probate and Administration Act, binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good cause under S. 50 of the Act for setting it aside.

There is no period of limitation for putting forward a "just cause" under S. 50 of the Probate and Administration Act but where a party has had an opportunity to put forward a particular just cause and has not chosen to put it forward, he cannot be heard to agitate the same cause later. There is no difference in principle between disallowing an applcation to revoke a grant for a "just cause" on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so.

The mere absence of a special citation in proceedings in which probate of a will is granted is not, where the person to whom a citation has not been issued is otherwise aware of the proceedings, a "just cause" for revocation.

S. 50 of the Probate and Administration Act, in certain circumstances, no doubt allows one party after another to attack in turn the grant of probate, but nothing in it supports the contention that each of such attacks in turn re-opens

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*A. A. O. No. 376 of 1922. 18th January 1924.

Venkataratnam v. Yanamandara Satyavati

all previous attacks and enables parties already defeated to press their attacks anew.

Per Wallace, J. :—A decree cannot be set aside by a mere petition on the ground of fraud.

Appeal against the Petition dated 11th September, 1922 of the District Court of Godavari at Rajahmundry in O. P. No. 151 of 1921.

C. S. Venkatachariar and *A. Venkatachalam* for appellants.

P. Somasundaram for respondents.

The Court delivered the following

Odgers, J.

JUDGMENTS:—*Odgers, J.*:—This is an appeal against the order of the District Judge of Godavari whereby he dismissed the appellant's petition to revoke a probate under S. 50 Probate and Administration Act. The previous history of the case is set out in the learned District Judge's order. The only facts we need consider are the following an application was made by the widow of one Appa Rao, deceased, in 1908 for letters of Administration to his estate with the will annexed. The will is printed at page 17 of the documents in A. A. O. No. 275 of 1920 and it is to be noted that the only property of the testator on which it could take effect was a sum of insurance money Rs. 1,000. The father of the testator entered a caveat to the proceedings of 1908 but withdrew it apparently in consequence of an agreement (printed at page 5 of the documents in appeal No. 110|15) to which this (1st) appellant *inter alias* was a party. The agreement shortly provided that the widow should take the Rs. 1,000, should adopt the son of the 1st appellant, (authority to her to adopt was given in the will) and withdrew her application for letters of Administration. The 1st appellant was a respondent to the application for Letters of Administration though he was not cited The agreement fell through, the father of the testator did not appeal in the proceedings and the widow obtained Letters of Administration. It appears that she subsequently adopted another boy. The present 1st appellant thereupon petitioned for a revocation of the Letters of Administration granted to the widow. This was dismissed both by the District Judge and by the High Court (Ayling and Napier, JJ.,) in A. A. O. No. 132|11 the learned Judges held that no just cause was shown for revoking the Letters of Administration. Several years afterwards two brothers of the 1st appellant in 1916 filed revocation proceedings. Their petition was allowed and the Letters of Administration to the widow were recalled the 1st appellant

Venkataratnam v. Yanamandara Satyavati

Odgers, J.

was along with the widow a respondent to the proceedings. The matter being contentious took the form of a suit (No. 55 of 1917). The 1st appellant was not a party in his own right and applied to be brought on in I. A. No. 609|19. This was dismissed by the District Judge as he had not objected to the grant originally and his subsequent petition for revocation had been dismissed. He was held not to be a proper or necessary party as he had no power in himself to ask for revocation. In the result the will was upheld and Letters of Administration were ordered to be re-issued to the widow. As a matter of fact this was never done as there was nothing left for the Letters of Administration to operate upon. Further the 1st appellant, as representing the widow would be the person or one to the persons to whom the Letters of Administration would be issued. The question is can the 1st appellant be now heard to reagitate the whole matter for his own purposes. It has first to be premised that the 1st appellant is clearly not interested in upsetting the will *qua* will. His grievance has nothing to do with the disposal of the Rs. 1,000 but with the power of adoption given by the will. He wants to use this means to upset the adoption made by the widow and which was not in accordance with the agreement above referred to. It is perfectly clear that the authority to adopt could have been given to the widow otherwise than by the testator's will. The present application is based on S. 50 Probate and Administration Act and the particular just cause relied on is the 2nd—the fraud alleged being the concealment of the agreement. I am by no means convinced that it was a duty incumbent on any of the parties to bring this agreement to the notice of the Court in 1908—nor am I convinced on the evidence that is before us that the testator's father failed to appeal in the proceedings of 1908 because the agreement was then subsisting. The judgment in No. 132|11 (page 7) shows to my mind that 1st appellant was aware of the proceedings and also that the agreement had by that time fallen through. The learned Judge there found as follows :—" The respondent's 4th witness's deposition clearly shows that the petitioner was aware of the proceedings during their pendency and such evidence receives support from the unimpeachable evidence of the other witnesses though the latter cannot fix the dates accurately ; the compromise attempted and referred to by these witnesses clearly shows that the petitioner was aware of the proceedings while they were

Venkataratnam v. Yanamandara Satyavāti

Odgers, J.

pending." In *Nistariny Debya* v. *Brahmomoyi* (1) it was held that the mere absence of a special citation in proceedings in which probate of a will is granted is not where the person to whom a citation has not been issued is otherwise aware of the proceedings a 'just cause' for revocation. I therefore hold that the 1st appellant was a party to the proceedings in 1908 and is bound by the decision of the Court. The learned Judge has held that the 1st appellant is debarred from reagitating the matter on account of *res judicata.* It is contended that it has been so held solely on the ground that 1st appellant was aware of the proceedings which were not strictly a suit. Further it will be noticed that the validity of the will has been upheld by this Court, in A. A. O. No. 275 of 1920 (Phillips, J., and myself). There this 1st appellant put in a memo. of objections wherein he repeated his allegation that in view of the agreement the Court ought to have made him a necessary party and enabled him to call evidence. He also adopted all the grounds of appeal against the validity of the will filed by the then petitioners (his brothers). It is not disputed that these form his grounds in the present appeal. This memo. of objection was not pressed and was dismissed by us. In my opinion the 1st appellant is barred by the application of the principle of *res judicata* though the words of S. 11 may not be strictly applicable. The matter has previously been in issue between the same parties and the validity of the will has been fully and finally established and in my opinion it would only be encouraging this protracted litigation to proceed to further lengths to hold the opposite. It is contended that the 1st appellant has up to now not had a chance to present his case. I am unable to agree. He had every chance to attend at the original hearing in 1908. He was heard in 1910 when his application to revoke was dismissed. He did not take steps to displace the order refusing to make him a party to suit No. 55|17; but he filed as stated a memorandum of objections to the appeal. The Privy Council has held in *Hook v. Administrator General of Bengal* (2) that the plea of *res judicata* still remains apart from the limited provisions of the Code and in *Sheoprasan Singh* v. *Ramanandam Prasad Singh* (3) their Lordships held that the application of the rules by the Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law. The

1. (1890) I L R 18 C 45. 2. (1921) I L R 48 C 499.
3. (1916) I L R 43 C 694 : 31 M L J 77.

Venkataratnam v. Yanamandara Satyavati

Odgers, J.

learned District Judge has further dismissed the appellants' petition on the ground that the judgment of the Court of Probate substantiating the will is a judgment in rem. So long as this is in force it is conclusive not only upon all the parties who may be before the Court but also upon all other persons whatsoever in all proceedings arising out of the will or claims under or connected therewith *Sarodakanto Dass* v. *Gobind Mohand Das* (4). It is contended by Mr. Venkatachariar that his conclusive character cannot apply to an attempt to set it aside. He further contended that the argument has no force as the Letters of Administration having been recalled and not re-issued there is in fact no such judgment in existance. In my view this is a fallacy ; the letters were recalled, but the validity of the will was finally established in suit No. 55|17 and Letters of Administration were ordered to be re-issued. The will must therefore be treated as having been valid all through and it is this judgment in No. 55|17 which has the force of a judgment in rem. It may be that a judgment in rem proved to have been obtained by fraud can be set aside. In my opinion there is no such evidence here. The validity of the will has been considered over and over again and has been finally established and the appellant is under the circumstances of this case bound by that decision. The appeal fails and must be dismissed with costs throughout.

Wallace, J.

Wallace, J. :—The original petition is in substance, though not in terms, an application to revoke the grant of a probate. The first appellant contends that the order granting probate on 13—3—1909 is not *res judicata* against him because first, it was not passed after contention and therefore the proceedings are not of the nature of a suit and therefore S. 11 of the C. P. Code does not apply, and secondly that, in any case, that grant was set aside by an order of the Court on the petition of his minor brothers, and that thereby the order of the Court was revoked. As to the first point it is clear law that any order passed after contention in a probate proceeding is *res judicata* in any subsequent proceeding of any sort against the caveators who contested it, see *Nuzhatud Dowla Abbas Hussain* v. *Mirza Kurratuland* (5), *Sheoparsan Singh* v. *Ramanandan Prasad Singh* (6) and *Hook* v. *The Administrator-General of Bengal* (7), and it would come within the purview of S. 11 of the Civil Procedure Code. Now, the appellant was aware

4. (1910) 12 C L J 91 at 97. 5. (1903) I L R 31 C 186.
6. (1916) I L R 43 C. 694 ·31 M L J 77. 8. (1921) I L R 48 499.

Venkataratnam v. Yanamandara Satyavati

Wallace, J.

of the probate proceedings, had an opportunity to contest but did not choose to contest them so that, it was owing to his own neglect that the proceedings did not become contentious. It appears to me that he is barred from re-opening the matter any more and this conclusion is based not so much on S. 11 of the C. P. Code itself but on the general principle of the Probate and Administration Act that the grant of probate by a competent Court is binding on all persons who had an opportunity of putting forward their objection before it was passed unless they can make out a good case under S. 50 for setting it aside. S. 50 lays down that for "just cause" the grant of probate of Letters of Administration may be revoked or annulled. There is no period of limitation for putting forward such a cause, since obviously the cause may only appear long after the grant; but it is an elementary principle that, where the party had an opportunity to put forward a particular just cause and had not chosen to put it forward, he cannot be heard to agitate the same cause later. No Court would, in my opinion, allow a "just cause" already agitated and decided upon before the grant of probate to be again made the subject of an application to revoke that grant, and I see no difference in principle between disallowing such an application on the ground of *res judicata* and disallowing it on the ground that the party already had a full opportunity of putting forward his just cause and omitted to do so. So that the question before us, as I view it, is whether the 1st appellant had an opportunity before the grant was made of urging the very grounds he now puts forward, or whether he urges any new grounds that have arisen since he had that opportunity which he refused to utilise.

I find that he urges nothing new. His petition does not arrange clearly his points of attack or state under which clause of S. 50 he appeals; but although he does not ask for the revocation of the order of 13—3—1909, his main points of attack seems to me to be (*a*) that the will was forged, (*b*) that there was fraudulent conduct of the widow in reference to an agreement, (*c*) his ignorance of the probate proceedings, (*d*) the non-service of summons or citation on him, (*e*) attacks on the conduct of O. S. No. 55 of 1917 into which the petition of his minor brothers was converted after their I. A. No. 383 of 1916 was allowed, and (*f*) the plea that the High Court by recalling the grant in C. M. A. No. 305 of 1917 vacated the original order, so that the whole proceedings are open in this Court. The first four points should have been made

grounds of attack before the first grant of probate, for, though no citation was served on him, he was aware of the proceedings. The citation was properly issued and the first appellant had sufficient knowledge of the proceedings—*vide* High Court's findings in A. A. O. No. 132 of 1911 and in Appeal No. 110 of 1915—and such knowledge was enough to render it incumbent upon him to put forward then any case he had. As to the attack on the conduct of O. S. No. 55 of 1917, it is an irrelevant matter in this petition, as such conduct would have no retrospective effect on the probate proceedings which the 1st appellant now seeks to reprobate.

As to the last point some discussion is necessary. The 1st appellant contends that the fact that the grant of probate to the widow under O. P. No. 534 of 1908 was revoked by the District Court in I. A. No. 383 of 1916 on the petition of his brothers enables him to plead that that grant is not *res judicata* against him, and that therefore the civil suit O. S. No. 79 of 1909 filed by him to set aside the adoption and the suit for partition by the adopted son of the widow, O. S. No. 6 of 1914, should also be allowed to be re-opened since he was not allowed in those suits to challenge the genuineness of the will, because of the previous grant of the Letters of Administration.

Now, as has been clearly pointed out in A. A. O. No. 305 of 1917, on the appeal by the widow against the order of revocation, that order was in any case wrong and the proper order was to recall the letters, which had the effect of holding the letters in abeyance until the contention between the widow and the petitioners in I. A. No. 383 of 1916 should have been tried in the form of a suit as provided by the Probate and Administration Act. The mere recall of the letter does not open to the 1st appellant any fresh opportunity to challenge the original grant since it is in no way the result of his attack. Any attack by others will not avail to set his attack on its legs again. S. 50, in certain circumstances, would allow one party after another to attack in turn the grant of probate, but nothing in it supports the contention that each of such attacks in turn re-opens all previous attacks and enables parties already defeated to press their attacks anew. There is no substance therefore in this last ground of attack under S. 50, Probate and Administration Act on the grant of probate on 13-3-1909.

The present 1st appellant applied to be added as a party-defendant in O. S. No. 55 of 1917. That application was

Venkataratnam v Yanamandara Satyavati

Wallace, J

refused on the ground that his right to oppose the issue of Letters of Administration had been negatived by the proceedings in 1909 granting Letters of Administration and could not be revived. No Civil Revision Petition was preferred from this order. When the decree in this suit when in favour of the widow and the petitioners in I. P. No. 383 of 1916 appealed to the High Court in A. A. O. No. 275 of 1920, the present 1st appellant did not in the High Court ask to be brought on record so that he might agitate his right to be made a party-defendant to the suit. That he knew of the appeal is not open to question, since he himself was brought on record in it as the legal representative of the widow who died during its pendency. As such legal representative he put in a memorandum of objections in which incidentally he alleged that the lower Court ought to have brought him on record in his own right, but that memorandum was not pressed and was dismissed. No doubt it was futile to press such a contention in his capacity as the legal representative of the widow, but that forms no excuse for his not himself applying to the High Court to bring him on record in his own right so that he might contest the refusal of the District Court to make him a party. This is sufficient to dispose of the vague prayers in this petition to declare that the final order in O. S. No. 55 of 1917 and the connected suits Nos. 79 of 1909 and 6 of 1914 are invalid, since it was rightly held in those suits that the petitioner cannot attack the probate proceedings declaring the genuineness of the will or the authority to adopt covered by it. There is no reason for re-opening these suits on the ground that he was wrongly prohibited from agitating these questions: while, as regards the allegation of fraud no decree can be set aside on such a ground by mere petition. I am clear that, so far as the 1st appellant is concerned, he has for ever lost his opportunity of challenging the grant, unless he discovers in future some fresh ground for challenge which he has not up till now put forward. This disposes of the first appellant's case.

The cases of the other appellants have not been separately pressed. Appellants 2 and 3 are the sons of the first and appellants 4 to 6 are the sons of the defendants in O. S. No. 55 of 1917 and obviously cannot re-open that decree by means of this petition. The 7th appellant is the mother of the original testator and has no interest in these proceedings.

I therefore agree that the petition should be dismissed with costs throughout.

A. S. V *Petition dismissed*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI AND MR. JUSTICE WALLER.

Venkat Reddy *Appellant** (*4th Defendant*)

v.

Kunjappa Goundan and others *Respondents* (*Plaintiff and defendants Nos.* 1, 2, 3 *and* 5).

Venkat Reddy *v.* Kunjappa Goundan

Mortgage—Decree for sale on—Sale of mortgaged property in execution and purchase thereof by stranger—Sale of portion of property in execution of money decree against mortgagor subsequent to mortgage but prior to sale in execution of decree thereon—Purchaser at, not made party to mortgage suit—Effect on rights of parties—Fresh suit for sale by purchaser in execution of mortgage-decree against purchaser in execution of money decree—Maintainability—Redemption by latter—Terms of—Order absolute for sale—Effect on mortgage security—Transfer of Property Act, Ss. 88, 89—*Civil Procedure Code of* 1908—*O.* 34, *R.* 5—*Distinction.*

The 5th defendant, a mortgagee of certain properties from the 1st defendant and the father of defendants 2 and 3, sued upon his mortgage and obtained a decree for sale. In execution of that decree all the mortgaged properties were sold and purchased by the plaintiff, the price paid by the plaintiff being sufficient to discharge the mortgage debt. The 4th defendant was an auction purchaser of one half of the mortgaged properties at a sale held, subsequent to the mortgage (in favour of the 5th defendant) but prior to the sale at which plaintiff became purchaser, in execution of a money decree obtained against the father of defendants 2 and 3. He (4th defendant) was not made a party to the suit by the 5th defendant, though the latter had notice of his (4th defendant's) rights.

In a suit brought by the plaintiff against defendant 1 to 5 for the recovery from the 4th defendant of the balance of the 5th defendant's mortgage debt and interest from the date of the mortgage up to the date of the plaintiff's sale together with future interest and for a sale of the properties in his possession in default of payment, *held* that plaintiff, as the assignee in law of the original mortgagee's rights by virtue of his purchase in Court sale, was entitled to institute a second suit for sale on the mortgage as against persons who were not parties to the prior suit ; that the only right of the 4th defendant was to redeem the mortgage ; that the amount payable by him as a condition of redemption was the amount of the decree in execution of which the property was purchased by the plaintiff, and that the plaintiff was not entitled to future interest as he had been in possession of one half of the properties purchased by him and the whole difficulty arose out of the default to make the 4th defendant a party to the original mortgage suit.

The effect of the omission in O. 34, R. 5 of the present C. P. C., of the words "and thereupon" (on an order absolute being passed) "the defendant's right to redeem and the security shall both be extinguished" is that the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit.

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*Second Appeal No. 1046 of 1922, 25th October 1923.

Venkat Reddy v. Kunjappa Goundan

Second Appeal against the decree of the Court of the Subordinate Judge of Vellore in A. S. No. 72 of 1921 preferred against the decree of the Court of the District Munsif of Tirupathur in O. S. No. 381 of 1919.

B. Somayya for appellant.

M. Patanjali Sastri for respondent.

The Court delivered the following

JUDGMENT :—The 4th defendant is the appellant. The suit as originally framed was one for foreclosing a mortgage executed by the 1st defendant and the father of the 2nd and 3rd defendants on the 3rd of April, 1914 in favour of the 5th defendant. The 4th defendant was the auction-purchaser of one half of the properties mortgaged in execution of a money-decree obtained against the father of the 2nd and 3rd defendants. He was not made a party to the suit on the mortgage. A decree was passed in the mortgage suit (O. S. No. 156 of 1917 filed by the 5th defendant) on the 5th of October, 1917 for Rs. 723-7-9 with costs and future interest. The plaintiff became the purchaser of the properties in execution of the mortgage decree for Rs. 757 on the 3rd of July 1918. When he attempted to take possession of the properties, the 4th defendant resisted the claim in so far as the half-share of defendants 2 and 3 was concerned and the plaintiff was referred to a suit. He then filed the present suit out of which this Second appeal arises.

The prayers in the plaint are that the plaintiff's rights as auction-purchaser may be declared; that the 4th defendant may be directed to pay the plaintiff the balance of the mortgage debt and interest from the date of the mortgage up to the date of the plaintiff's sale which he says amounts to Rs. 867-8-0 with future interest and then to redeem the plaint properties, that in the event of the properties not being redeemed, the 4th defendant should be deemed to have lost his equity of redemption, and that on the happening of such an event the 4th defendant should be directed to deliver possession of the properties to the plaintiff. A prayer was subsequently added asking for a sale of the properties if they are not redeemed and possession given and for the recovery of any balance from the defendants.

The 1st defendant filed a written statement pleading that he is not in possession of the plaint properties, that he never obstructed the plaintiff from taking possession and that there is

Venkat Reddy v. Kunjappa Goundan

no cause of action against him. Defendants 2 and 3 filed no written statements. The 4th defendant filed a written statement pleading *inter alia* that his father bought one-half share in the plaint properties in Court sale and was put in possession; that his father was and after his death he the 4th defendant is in lawful possession, that the plaintiff and his mother-in-law (the mortgagee) had notice, that although they had notice, the plaintiff in O. S. No. 156 of 1917 when she sued on the mortgage did not implead the 4th defendant as a party, that the decree in that suit does not bind the 4th defendant, that when a final decree was passed in the mortgage suit the mortgage became extinguished and no cause of action exists as on the mortgage, that he never obstructed the plaintiff from taking possession of the properties, that a suit for foreclosure would not lie as the mortgage was a simple mortgage, that the plaintiff does not derive any rights under the mortgage, he being simply an auction-purchaser in a Court sale and not a party to the original mortgage, that even assuming that the 4th defendant has to redeem, he is not bound to redeem the whole mortage, that the persons whose share he bought were divided from the 1st defendant and thay received only Rs. 100 out of the mortgage money and that he is only bound to pay Rs. 100 and not the whole amount due on the mortgage if he should be directed to redeem the property. On the amendment of the plaint by adding a prayer for sale an additional written statement was filed by the 4th defendant pleading that the plaintiff has no right to bring the properties to sale, that his claim for such a relief is barred by limitation, that the mortgage was discharged before the date of the suit and that there was no mortgage on which any decree could be passed.

The District Munsif passed the usual mortgage decree for sale in favour of the plaintiff for Rs. 1,041-13-7 with costs and further interest. An appeal was filed by the 4th defendant against this decree which was dismissed by the Subordinate Judge.

The two questions arising for determination in the Second Appeal are whether the plaintiff who is only an auction—purchaser in execution of a mortgage decree can sue on the original mortgage either for foreclosure or sale and if so whether he can recover the whole amount due on the mortgage or only the difference between the amount for which he purchased the properties and the value of the property which is in the posses-

sion of the 4th defendant, he having admittedly got possession of the other half of the properties.

There can be little doubt on the facts that the original mortgagee not having made the 4th defendant a party to the mortgage suit, the right of the 4th defendant to redeem would not be extinguished and the 4th defendant would have all the remedies open to him which he would have had if he had been made a party. It is contended by the appellant that the plaintiff in the mortgage suit who had notice of the 5th defendant's rights not having joined him but having elected to proceed to sell the properties in his absence and to obtain a final decree against the original mortgagors for any balance cannot now proceed as regards the property in the possession of the 4th defendant who claims as the son of the auction-purchaser in execution of a money decree against defendants 2 and 3 who admittedly were entitled to a half share in the properties. We do not think that this contention is sound. Order 34, R. 1 of the Civil Procedure Code enacts that subject to the provisions of the Code all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. It does not give the consequences of the failure to join and we think that in such cases the only effect would be that the person not joined would not be affected by any decree that may be passed and would be entitled to enforce such rights as he might have had against the original mortgagor and the mortgagee or the auction purchaser in execution of a decree obtained by the mortgagee without joining the other encumbrancers or persons entitled to the property.

In dealing with this question it should be remembered that S. 85 of the Transfer of Property Act contained a proviso that the plaintiff should have notice of the interest of the persons whom the section says he ought to join. But Ss. 85 to 90 were repealed by and incorporated in O. 34, of the Civil Procedure Code. Order 34, R. 1 which corresponds to S. 85 does not contain any proviso but simply states that subject to the provisions of the Code, all persons having an interest either in the mortgage security or in the right of redemption shall be joined as parties to any suit relating to the mortgage. Section 89 of the Act which prescribed the procedure to be followed when the defendant fails to pay the amount due into Court enacted that the plaintiff may apply to the Court for an order absolute for sale of the mortgaged property and proceeded as follows:–

Venkat Reddy v. Kunjappa Goundan

And the Court shall then pass an order that such property, or a sufficient part thereof, be sold, and that the proceeds of the sale be dealt with as, is mentioned in S. 88 ; and thereupon the defendant's right to redeem and the security shall both be extinguished." This section has been re-enacted as O. 34, R. 5 of the Code and the words in S. 89 of the Transfer of Property Act to the effect that the defendant's right to redeem and the security shall both be extinguished on an order absolute being passed are omitted and consequently the mortgage is kept alive for all purposes as regards persons having an interest but not made parties to the mortgage suit.

It is difficult to see how a second suit against a person not impleaded in the previous suit would be barred under any of the provisions of the Civil Procedure Code. It is no doubt true that the first mortgagee who had notice of a puisne encumbrance could have impleaded that puisne encumbrancer in the suit on the first mortgage but the failure to do so would not necessarily bar the second suit against the puisne encumbrancer unless there is anything in the Code barring such a suit. The cause of action is not the same as in the previous suit nor would the points to be decided necessarily be the same.

In *Sukhi* v *Ghulam Safdar Khan* (1) Their Lordships of the Privy Council held that the rights of a puisne mortgagee not made a party to a previous suit on the mortgage to enforce the security are not affected by the fact that a prior mortgagee obtains a decree for sale on his mortgage and brings the property to sale in execution. They also held that if a puisne mortgagee files a suit on his own mortgage, the auction purchaser in execution sale in a prior mortgage can use the prior mortgage right as a shield and claim payment of the amount due under the prior mortgage decree as a condition of a decree for sale in favour of the puisne mortgagee and pointed out the change effected by O. 34 rr. (3) and (5) of the Code which do not re-enact the last portion of S. 89 of the Transfer of Property Act and distinguish the case of *Het Ram* v *Shadi Ram* (2) on the ground that that decision proceeded on S. 89 of the Transfer of Property Act. It is therefore unnecessary to consider the decisions cited by the appellant's vakil which were based on the view that on the making of an order absolute on a mortgage-decree the mortgage is extinguished. It has been held that a mortgagee not made a party to a suit by another

1. (1921) I L R 43 A 469 (P C). 2. (1918) I L R 40 A 407.

Venkat Reddy v. Kunjappa Goundan

mortgagee can file a separate suit on his own mortgage. In *Rangasamy Naicken* v. *Komarammal* (3) the property was first mortgaged to the plaintiff and then to the 3rd defendant in the suit. The plaintiff brought a suit on his mortgage without making the 3rd defendant a party and obtained a decree and the share of the 1st defendant was sold in Court auction and purchased by the plaintiff who filed a suit for partition and for the recovery of the 1st defendant's share. The 3rd defendant contended that he was entitled to redeem the plaintiff and it was held that the plaintiff was not entitled to possession without redeeming the 3rd defendant and that it was immaterial whether the plaintiffs failure to join the 3rd defendant as a party to the previous suit was wilful or due to ignorance. In *Goverdhana Dass* v. *Veerasami Chetti* (4) the plaintiffs who had the first and second mortgages of the same property sued their mortgagors, obtained a decree, brought the property to sale and purchased it. They did not make the 3rd mortgagee a party to that suit. The plaintiffs then filed a suit against the mortgagors and the 3rd mortgagee and prayed that the 3rd defendant might be decreed to pay them the amount due under their decree and that, in default, it be declared that he is debarred of his right to redeem the prior mortgage, and that he be ordered to surrender possession of the property to the plaintiffs. It was held that the right of the 3rd mortgagee was not affected either by the decree or the sale, that the only effect of the sale was to transfer to the purchaser the equity of redemption of the mortgagor and that the only right which the 3rd mortgagee, could exercise was that which he could have claimed to exercise if he had been a party to the suit on the prior mortgage, namely, the right to redeem that mortgage with the view of enforcing his own mortgage. In *Ram Prasad* v. *Bhikari Das* (5) which was a case of a stranger purchaser, property subject to a mortgage was sold by auction in execution of a simple money decree and the purchasers were put in possession. A suit was then filed by the mortgagee for sale on his mortgage without making the previous auction-purchasers as parties and a decree was obtained in execution of which the property was again sold and purchased by a third party. It was held in a suit by the purchaser at the sale held in execution of the mortgage decree claiming pay-

3. (1902) I L R 26 M 484. 4. (1902) I L R 26 M 537.
5. (1903) I L R 26 A 464.

Venkat Reddy v. Kunjappa Goundan

ment of the amount due under the mortgage or in default possession of the mortgaged property that the person who purchased the property in execution of the money-decree must be allowed to redeem on payment of what was found due on the mortgage at the time the mortgage decree was passed and that if the payment was not made within the time fixed, the plaintiff was entitled to a decree for foreclosure and possession of the property. *Govardhana Doss* v. *Veerasami Chetti* (4) was cited with approval. In *Sham Dei* v. *Baljit Singh* (6) a prior mortgagee brought the whole of the mortgaged property to sale without impleading a subsequent mortgagee of a portion and purchased the property himself. The subsequent mortgagee brought a suit in respect of the portion mortgaged to him without impleading the prior mortgagee and became the purchaser of the portion. The prior mortgagee who was unable to get possession from the subsequent mortgagee filed a suit to bring the property to sale for the realization of the unrecovered balance of the original mortgage money. It was held that a suit was maintainable by him and was not barred either by S. 13 or 43 of the C. P. C. (1882).

In *Chinnu Pillai* v. *Venkatasami* (7) Srinivasa Iyengar, J. after an exhaustive review of the authorities observed as follows :—" If the view which I have set forth is correct, in the case where the first mortgagee had omitted to make the second mortgagee a party, and proceeded to sale, the purchaser whether himself or another, can bring a fresh suit for sale making the second mortgagee a party ; or he can as a defendant when the second mortgagee institutes a suit for sale, insist on a sale of the property free of his mortgage, or if he had not proceeded to sale before the second mortgagee's sale, he can, though not made a party, get the necessary relief by applying for sale free of encumbrances in the second mortgagee's suit." Reference was made to the observations of Sadasiva Aiyar, J. in *Lakshmanan Chetti* v. *Muthayya Chetti and others* (8), where the learned Judge after referring to *Jugdeo Singh* v. *Habibullah Khan* (9) observes that he was inclined to hold " that where the first mortgagee had notice of a second mortgage (which he must be presumed to have where the second mortgage is registered and where he omits to make the second mortgagee a party as he was bound to do under S. 85 of the

4. (1902) I L R 26 M 537.
6. (1909) I L R 32 A 119.
7. (1915) I L R 40 M 477.
8. (1920) 40 M L J 126.
9. (1907) 6 C L J 612.

Venkat Reddy v. Kunjappa Goundan

Transfer of Property Act and O. 34, R. 1 of the present Civil Procedure Code, he ought not to be allowed to bring a second suit for sale against the second mortgage with or without the addition as party of the original mortgagor against whom he had already obtained a decree, simply because he finds his first decree valueless against the second mortgagee and is confronted with difficulties owing to the second mortgagee's putting forward his rights. It is however unnecessary to pursue this point further for the decision of this case." These observations are obiter, and we may point out that the recent decision of the Privy Council in *Tilakdhari Lal* v. *Khedam Lal* (10) has now settled the law that registration is not notice. We have already pointed out the difference in words between S. 85 of the Transfer of Property Act and O. 34, R. 1 of the Civil Procedure Code. In view of the decisions which we have referred to above, we do not think that a second suit would be barred. The result of the authorities is where a mortgagee makes all the necessary persons parties, obtains a decree and sells the mortgaged property, the purchaser acquires the equity of redemption of the mortgagor and the property is sold free from the mortgage rights of the mortgagee in the working out of which rights the property is sold and the purchaser is entitled, if necessity arises, to take advantage of the lien which the mortgagor had and use it as a shield against the claim of third persons where the owner of the equity of redemption is not made a party, it still remains in the mortgagee and different considerations would arise.

This being the state of the law as regards puisne and subsequent encumbrancers, the question arises as to what the rights of a purchaser in a Court sale are where the purchaser purchases the items of property mortgaged in execution of a decree to which a prior purchaser in execution of a simple money decree obtained after the mortgage of a portion of the mortgaged property has not been made a party. Where the purchaser in execution of a mortgage decree has purchased the property for an amount equal to or more than the amount due on the mortgage, the mortgagee who receives the purchase-money is fully satisfied and has no further claims on the mortgage which is discharged and it can only be kept alive for purposes of being used as a shield against the claimants of third persons.

So far as the present plaintiff is concerned, he is a purchaser in Court sale in execution of a mortgage-decree and

10. (1921) I L R 48 C 1. (P. C.)

Venkat Reddy v. Kunjappa Goundan

the price paid by him was sufficient to discharge the mortgage debt. The purchase by the 4th defendant was subsequent to the mortgage and in execution of a simple money-decree. If he had been made a party, he would have no right except the right to redeem the mortgage and if he did not do so, the sale in execution of the mortgage decree would have conveyed his interest also in the property. As we are of opinion that it is open to the purchaser as the assignee in law of the rights of the original mortgagee by virtue of his purchase in Court sale to institute a second suit as against persons who were not parties to the prior suit, it is clear that he has got the same rights as the original mortgagee would have had if he had filed a suit and the defendant cannot be in a better position than he would have been if he had been made a party to the original mortgage decree in execution of which the property was sold.

The next question is as to the amount payable by the 4th defendant. In *Sivathi Odayan* v. *Rama Subba Aiyar* (11) three items of property were mortgaged to a person for Rs. 5,000. Two of the items were sold and the proceeds applied towards the discharge of the mortgage. The third item was sold for Rs. 990 but the money was not paid towards the discharge of the mortgage and the person to whom the third item was sold transferred his right to the defendants in that suit. The original mortgagee filed a suit on the mortgage without making the transferees of the third item as parties. A decree was passed as regards the third item for Rs. 1,050, the amount then due on the mortgage against the original mortgagor and the intermediate transferees and the land was sold and purchased by the plaintiff for Rs. 270. The purchaser filed a suit for possession of the property against the defendants who were entitled to the third item of property. It was held that the defendants who were not parties to the previous suit are entitled to redeem on payment not of Rs. 270 the amount for which the plaintiff purchased the item of property in dispute but of Rs. 1,050 the amount due under the decree. Subramania Aiyar and Benson, JJ. after referring to Fisher on Mortgages, 5th Edition, S. 1734, *Davis* v. *Barrett* (12) and *Macrae* v. *Goodman* (13) held that a person who was not made a party to a previous litigation on a mortgage was bound to pay not merely the sum actually paid by the auctoin-purchaser at the Court sale in execution of the decree in the previous

11. (1897) I L R 21 M 64 : 7 M L J 319. 12. (1851) 14 Beav 542.
13. 5 M P C 325.

Venkat Reddy v. Kunjappa Goundan

suit but the amount actually due and payable on the mortgage so far as that item was concerned.

It is contended for the appellant that S. 60 of the Transfer of Property Act applies to the present case and that the appellant is entitled to redeem the property purchased by him in Court sale in execution of the money decree on payment of the proportionate amount as the item sold to him was liable to contribute rateably to the debt secured by the mortgage. Reference has been made to *Venkatasami Naicken* v. *Ramanathan Chettiar* (14). In that case some items of property were mortgaged and the mortgagee in execution of the mortgage decree purchased four items himself. Before the date of the mortgage-decree one of the items purchased by the mortgagee was sold by the mortgagor to the appellant in that case who was not made a party to the suit brought by the mortgagee. It was held that the mortgagee must be taken to have split up his security and precluded himself from objecting to an apportionment, that the appellant was entitled to redeem his own share only on payment of the proportionate amount which the item sold to him was liable to contribute rateably to the debt secured by the mortgage and that the mortgagee was entitled to interest according to the mortgage-deed and not according to the decree. The learned Judges treated the sale in execution of the mortgage-decree as valid and observed as follows :— "Treating the sale then as valid, the mortgagee has acquired by purchase the interest of the mortgagor in some of the items and there is no doubt that he must be taken to have split up his security and precluded himself from objecting to an apportionment. It was then contended that the appellant must at least pay the proportionate share of the debt chargeable on the items other than those which he has purchased. When the mortgagee has split up his security and precluded himself from objecting to an apportionment, we are of opinion that he is not entitled to insist upon the appellant redeeming more than his own share on payment of the proportionate amount which item No. 4 (purchased by the appellant) is liable to contribute rateably to the debt secured by the mortgage. The words of S. 60 of the Transfer of Property Act are in favour of the view." Reference has also been made to *Moro Raghunath* v. *Balaji Trimbak* (15). In this case the plaintiff purchased part of the lands comprised

14. (1910) 8 M L T 409. 15. (1888) I L R 13 B 45.

in his mortgage in execution of the mortgage-decree obtained by him. The other parts of the land were in possession of third persons and were purchased by them. The contention raised was that the plaintiff having purchased part of the lands comprised in the mortgage could not seek to burden the remaining lands included in the mortgage with the whole of the mortgage debt but that only a proportionate part of the debt must be satisfied. This contention was upheld. These cases are distinguishable as in the present case the mortgagee purchased in execution of his decree all the items of property mortgaged and has done nothing which would indicate an intention of splitting up his security. We think that the present case falls within the ruling in *Sivathi Odayan* v. *Rama Subba Aiyar* (11) above referred to.

Venkat Reddy *v.* Kunjappa Goundan

As regards the amount payable, it will be the amount of the decree in execution of which the property was purchased by the present plaintiff.

As rgards the interest, the plaintiff has been in possession of one half of the property as to which no objection has been taken. The whole difficulty has arisen out of the plaintiff's default in not making the 4th defendant a party to the original mortgage suit. We do not think that this is a case where interest ought to be allowed.

The decree of the lower Court will be modified accordingly. The parties will pay and receive proportionate costs. No personal decree. Time 6 months.

A. S. V. *Decree modified.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE WALLER.

Vairavan Servai *Petitioner* (Accused).*

Vairavan Servai *In re*

Indian Arms Act, S. 19 (e)—Servant—Use of gun for his own purposes in absence of master—Conviction of, for offence under S. 19 (c)—Legality—Confiscation of gun—Order of—Validity—Conditions.

There is nothing in the wording of S. 19 (*e*) of the Arms Act to justify the view that any person who has got a license or who is exempted from taking out a license is entitled to allow any servant of his to use the gun for

*Crl R P No. 513 of 1923.
Crl R C No. 644 of 1923. 17th January, 1924.

11. (1897) I L. R. 21 M 64 : 8 M. L. J. 21.

Vairavan Servai *In re*

the latter's own purposes. If the servant carries the gun for purposes of his master or in the presence of his master, that may not be an offence under the Act; but to go further will be going against the terms of the Act.

Where the master was misled by the District Magistrate into thinking that he was entitled to allow his gun to be used by his servant, and he and his servant honestly believed that they were doing nothing wrong in allowing the servant to take the gun and to use it for the purpose of shooting game in the forest, *held* that the order of confiscation of the gun was wrong, though the servant might be rightly convicted of an offence under S. 19 (*e*) of the Arms Act.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the order dated 2—3—1923 of the Court of the District Magistrate of Ramnad at Madura in D. Dis. No. 1347 of 1923 (C. C. No. 86 of 1922 on the file of the Court of the Sub-Divisional 1st Class Magistrate of Devakotta).

M. Patanjali Sastri and *C. S. Rama Rao Sahib* for the petitioner.

The Public Prosecutor on behalf of the Crown.

The Judgment of the Court was delivered by

Krishnan, J.

KRISHNAN, J. :—This is an application made to this Court to revise the conviction of the accused, one Vairavan Servai, under S. 19 (*e*) of the Arms Act, as he was found carrying a loaded gun in contravention of the provisions of S. 13 of the same Act which runs thus "No person shall go armed with any arms except under a license and to the extent and in the manner provided thereby."

What happened in this case was that the accused Vairavan Servai was found with a loaded gun trying to shoot game in the forest. When he was asked for an explanation he said that his master Mr. Delhi Batcha Thevar owned the gun, that he was carrying it for him and that his master was somewhere in neighbourhood, but, when he was asked to fetch his master, he was unable to do so; in fact his master was nowhere near, The finding is that he was using the gun for his own purposes.

It has been urged before us that Mr. Delhi Batcha Thevar is a person exempted under the Rules framed under the Arms Act published in the Fort St. George Gazette of January 13, 1920, and that as a retainer or servant of Mr. Delhi Batcha Thevar the accused was also entitled to carry the gun and he had therefore committed no offence by doing so. In the first place, we are not sure whether the accused's master is entitled to claim exemption under cl. 11 in the list of exempted persons

Vairavan Servai *In re*

Krishnan, J.

as a landholder as the learned Vakil argues. To make sure of it it would be necessary to call for an express finding on that point. But we will assume for the purpose of this case, without deciding the question, that Mr. Delhi Batcha Thevar is entitled to contend that, because his master is an exempted person he has not infringed the Act. We do not think his contention is correct, for, on the findings in this case, he was not carrying the gun for his master at all but he was using the gun himself for his own purposes in the forest for shooting game. We do not think there is anything in the wording of S. 19 (*e*) of the Act which would justify us in going so far as to say that any person, who has got a license or who is exempted from taking out a license, is entitled to allow any servant of his to use the gun for the latter's own purposes.

We need not refer to all the authorities that have been cited to us, for except the case in *Madho Lal* v. *The Emperor* (1) the other cases turn upon the facts of those cases. It has been held in that case that, where an accused, a servant, was found using a gun lent to him by his master who had a license, and using it for his own purposes, his act was an infringement of the provisions of S. 19, cl. (*f*) of the Arms Act. Cl. (*e*) of the section is very similar to cl. (*f*). We agree with that ruling of the Calcutta High Court ; that case has considered the previous cases including *Queen Empress* v. *Gungadin* (2). We think it will be an unjustifiable extension of the Act to hold that a person having a license can allow any servant of his to do what he likes with his gun, as the learned Vakil for the accused argues before us. If the servant carries the gun for purposes of his master or in the presence of his master that many not be an offence under the Act; but to go further, we think, will be going against the terms of the Act. We think that, in this case, there was a clear infringement of the provisions of cl. (*e*) of S. 19 of the Act by the accused, and that therefore he is guilty of the offence that has been found provd against him by the lower Courts.

The question, however, remains as to what the punishment should be and whether the gun which has been ordered to be confiscated should be confiscated. It would seem from the correspondence that Mr. Delhi Batcha Thevar was rather misled by certain letters, of the District Magistrate, particularly Ex. I, in thinking that he was entitled to allow his gun to

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1 (1908) 13 C. W. N. 1211 2 (1899) I. L. R. 22 A. 118 19 M. W. N. 213.

Vairavan Servai *In re*

Krishnan, J.

be used by his servant, Vairavan Servai, the accused in this case, whose name he gave to the District Magistrate in Ex. V ; apparently he and his servant honestly believed that they were doing nothing wrong in allowing the servant to take the gun and use it as was done in this case. We therefore think that the order of confiscation should not be enforcd ; we set aside the Order of confiscation of the gun in this case. We consider however that the fine of Rs. 30 in the circumstances of this case is not an excessive sentence and we confirm the fine. Subject to the above modification as to confiscation we dismiss the petition.

A. V. S. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice*, AND MR. JUSTICE KUMARASWAMI SASTRI.

Sengoda Goundan *Appellant** (*1st Defendant*)

v.

Minor Muthu Goundan by next friend Komaravela Goundan and others. *Respondents* (*Plaintiff and Defendants Nos* 2, 3 & 5)

Sengoda Goundan *v.* Muthu Goundan

Hindu Law—Partition—Suit by two minor plaintiffs—Decree—No severance of interest between plaintiffs inter se.

If in a suit for partition instituted by one or more members of a joint Hindu family a decree is passed, the effect of the decree on the status of the remaining co-parceners must be determined by the terms of the decree. Where two minor brothers represented by a next friend sued for partition and a compromise decree was passed allotting two-thirds share of the whole family properties to both the plaintiffs without specifying their individual share, *held* that the decree did not effect a severance in status between the plaintiffs *interse.*

Mussamant Jatti v. *Banwari Lal* 45 M L J 355 ; (P. C) *Balbaux* v. *Rukhma Bai*, I L R 30 C 231, 253 ; distingushed.

Rangasami Naidu v. *Sundararajulu Naidu*, 31 M L J 472 ; *Palaniammal* v. *Muthuvenkatachala Maniagaran*, 33 M L J 759 relied on.

Second appeal against the decree of the District Court of Salem in A. S. No. 45 of 1921 preferred against the decree of the Court of the District Munsif of Namakkal in O. S. No. 1269 of 1918.

T. M. Krishnaswami Iyer for appellant.

V. N. Venkatavaradachari for respondent.

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*Second Appeal No. 767 of 1922. 29th January, 1924.

Sengoda Goundan v. Muthu Goundan

The Court delivered the following

JUDGMENTS :—*The Officiating Chief Justice* :—This suit is for partition and the question argued before us relates to the plaintiff's claim to succeed to the share of his deceased minor brother by right of survivorship. There was a previous suit by the plaintiff and his brother, both being minors represented by a next friend, for partition, which ended in a compromise decree Ex. A, dated 24th November 1915. It has been argued before us that, when two persons ask for a partition, it should be implied that they intend to get divided from each other as well as from the joint family to which they belong. Nothing can be gathered from the fact that in the former suit the two minor plaintiffs combined to ask for a partition as to their intention to become divided *inter se*. The right to obtain a partition, though personal, happened to be common to both the plaintiffs, and common questions of law and fact arose out of their suing. The mere fact that there was one trial and one decree in the former suit was a consequence of procedure applicable to persons suing under the same cause of action rather than conduct showing an intention to become separated *inter se*.

In *Mussamat Jatti* v. *Banware Lal* (1), the Privy Council quoted a former decision by that body, *Balabux* v. *Rukhmabai* (2), in which Lord Davey remarked that there was no presumption when a co-parcener separates from others that the latter remained united. The agreement to remain united must be proved like any other fact. The Privy Council did not say that there was no presumption in such a case that the other co-parceners became divided, as it was not necessary to do so for that decision. But it seems to me that such is the case. In *Rangasami Naidu* v. *Sundararajulu Naidu* (3), it was held that the separation of one member of a co-parcenary was not necessarily a separation of the remaining members, and in *Palaniammal* v. *Muthuvenkatachala Maniagaran* (4). Sir John Wallis, C. J., and my learned brother held that, if a partition takes place under a decree of Court, the effect of the decree on the remaining co-parceners must be determined by the terms of the decree or by the scope of the suit. I think that Sadasiva Aiyar, J. went too far in *Mangal Sen* v. *Muhammad Hussain* (5), in observing that there was a presumption

1. (1923) 45 M. L. J. 355.
2. (1902) I. L. R. 30 C. 231.
3. (1916) 31 M. L. J. 472.
4. (1917) 33 M. L. J 759.
5. (1915) 27 I. C. 736.

Sengoda Goundan v. Muthu Goundan

that, when one of several co-parceners has become divided, the others also have become divided in status. The Privy Council decisions to which he referred do not support such a proposition.

If the effect of the former decree is to be determined by the terms of it, we find from Ex. A that in the former suit both the plaintiff and his brother had the same next friend to represent them and the decree speaks of their two-thirds share, not of their properties as two shares each representing one-third of the whole. There was no order that their two-thirds share should be divided into separate shares, and no authority has been shown for a guardian of two undivided minors dividing their status so as to make them lose their rights of survivorship to each other. The District Judge observes that the plaintiff and his brother did not sue for division *inter se* and that the decree does not divide their shares, and he formed a conclusion from their conduct that they remained undivided, agreeing with the first Court on that point. I see no reason to interfere with that finding on any point of law. I would, therefore, confirm the decree of the lower appellate Court, and, as the other grounds of Second Appeal are untenable and have not been seriously pressed, this Second Appeal must be dismissed with costs.

The Memorandum of Objections, which relates to mesne profits anterior to the date of the institution of the suit is dismissed with costs.

Kumaraswami Sastri, J. :—I agree with my Lord. I think there is no authority for holding that, where two members of a joint family sue for partition, it *necessarily* divides them *inter se*. The observations of the Privy Council in *Balabux* v. *Rukhmabai* (2) and the decisions of this Court in *Rangaswami Naidu* v. *Sundararajulu Naidu* (3) and *Palaniammal* v. *Muthuvenkatachala Maniagaran* (4) are clearly against that contention.

A. V. V. *Second Appeal dismissed.*

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2. (1902) I. L. R 30 C, 231. 3. (1916) 31 M. L. J 472.
4 (1917) 33 M L. J 759

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice* AND MR. JUSTICE WALLACE.

P. Kanniappa Chettiar and others. .*Appellants** (*Defendants*)

v.

K. Ramachandraiyar and another .*Respondents* (*Plaintiffs*).

Kanniappa Chettiar *v.* Ramachandraiyar

Madras City Tenants Protection Act (III of 1922), S. 9—Applicability—Ejectment decree—Application for purchasing landlord's interest—Pendency of appeal when Act came into force—Rights of parties—Appeal if a continuation of suit—Temple lands—Building leases for 21 years—Option to renew for similar period—Validity of.

The lessee from the trustees of a temple in the City of Madras obtained a decree in ejectment against his tenants in the City Civil Court. The tenants appealed to the High Court and stay of execution was ordered. During the pendency of the appeals, the Madras City Tenants' Protection Act (III of 1922) came into force and the tenants applied to the High Court within 15 days thereof for orders directing the landlord to sell the land to them. *Held,* S. 9 of the Act is intended to apply to cases in which suits are pending and where suits have resulted in decrees but such decrees have not been executed. The decision in A. A. O. No. 182 of 1922 (46 Mad 836: 44 M. L. J, 271) dissented from

As an appeal is really a continuation of the proceedings in the suit and a stage in the same, the application was properly made to the High Court ; if there had been no appeal pending, the application under S. 9 lay to the City Civil Court, because it was the intention of the Act that, after the decree but before execution, at any time an application could be made to the Court having had control of the suit.

Scope of S. 10 and the mode of valuation under S. 9 considered.

Where the trustee of a temple grants a lease of temple lands for building purposes for a term of 21 years with an option to the tenant to renew it for a like period at an enhanced rent it is a transaction which any prudent man is entitled to enter and as such the lease with the option to renew is valid. The position under the Indian Trusts Act considered.

Appeals against the decrees of the City Civil Court, Madras, in O. S. Nos. 256, 257, 258, 260, 262, 263 and 267 of 1921 and Petitions praying that in the circumstances stated in the affidavits filed herewith the High Court will be pleased to issue an order directing the respondents herein to sell to the petitioners herein the lands described in the schedules to the plaints in the said original suits.

These Appeals and Petitions coming on for hearing on Friday, the 5th January, 1923, the Court delivered the following

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* City Civil Court Appeals Nos. 51 to 57 of 191.
Civil Mis. Petition Nos. 900, 902, 904, 906, etc. 7th December 1922.

Kanniappa Chettiar v. Ramachandraiyar

Sir Walter Salis Schwabe, C. J

JUDGMENT :—*The Chief Justice* :—These are appeals from the decrees of the City Civil Court for ejectment and mesne profits. The plaintiff is a lessee from the trustees of a temple of the lands in question which have been sub-let to the defendants in smaller portions. Several grounds of appeal were raised in the notice of appeal, but they have all been abandoned before us except one ground, namely that amount awarded for mesne profits was awarded without any evidence before the Court to justify the amount. The plaintiff had alleged in his plaint that the proper rent of the land is so much. The defendants in their written statements had not admitted that that figure was correct. Without hearing any evidence, the learned Judge accepted the figure as given in the plaint. In my judgment there was no justification for that, and in the absence of evidence to the contrary, he ought to have taken not that figure but the figure of the rent actually being paid by the various defendants. We are told that nothing was said about the matter in the Court below, and that the plaintiff does not accept the view that the rents actually payable are the proper rents. In the circumstances of the cases I think it is right that these cases should be sent back to the Judge, City Civil Court, for an enquiry into, and on proper evidence, to decide the proper amount payable for mesne profits.

But the important question before us is rather raised by petitions presented to this Court by the various defendants under the Madras Act III of 1922. That Act came into operation after the decrees in these suits but before the execution of those decrees, which, in fact have never been executed, this Court having granted a stay pending the hearing of these appeals. The applications are under S. 9 of that Act, which section provides in certain cases for the purchase by a tenant of his landlord's interest in the land. It is contended on behalf of the plaintiff that that section has no application to a case where a decree for ejectment has been made, as I understand the argument, whether an appeal is pending from that decree or not or whether a decree has or has not been executed. The argument is mainly based on the decision in Appeal Against Order No. 182 of 1922*. In that case, the decree for ejectment had been passed, had come up to this Court on appeal and had, on appeal, been confirmed but the decree had not been executed when the petition for leave to purchase under S. 9 was made. It was held that, the decree having

* *Latifa Bibi v. Mottai Ammal.* 44 M. L. J. 271 : 46 M. 836.

been passed and confirmed, the Court had no jurisdiction to grant the petition. That these suits are pending in this Court, I think, is clear from a series of decisions, which decide that in this country an appeal is really a continuation of the proceedings or, as it has been put, is a stage in and part of the proceedings in a suit. Vide *Krishnamachariar* v. *Mangammal* (1), *Settappa Goundan* v. *Muthiah Goundan* (2), *Kamayya* v. *Papayya* (3), and particularly the very learned Judgment of Mookerji, J., in *Rai Charan* v. *Biswanath* (4). See also the decision of the Privy Council in an appeal from Ceylon, *Ponnamma* v. *Arumugam* (5). In *Latifa Bi* v. *Mottai Ammal* (6), the Court based its Judgment mainly on the view that, because S. 10 in terms applied the provisions of this Act for compensation for tenants to cases where there had been decrees for ejectment which had not been executed, it followed that S. 9 was not applicable in such cases. But, it is to be observed that S. 10 also applies the compensation sections to cases in which suits are pending, and on the same argument, it would follow that S. 9 need not apply to cases where suits for ejectment are pending, whereas in fact S. 9 applies principally to such cases. The answer, in my judgment, is that S. 10 is dealing with compensation cases, and S. 9 is dealing with cases of purchase and is in itself a complete Code for those cases ; and on an examination of S. 9, it is clear that it is intended to apply to cases in which suits are pending and cases in which suits have resulted in decrees but such decrees have not been executed, because in sub-section (3), it says that on an order for conveyance of the land after payment of the price fixed by the Court being made, " any decree or order in ejectment that may have been passed but which has not been executed shall be vacated, " and there would be no meaning to be attributed to those words at all if it was not contemplated by that section that application could be made in cases where a decree had been passed, but had not been executed.

In my judgment all these cases come directly under S. 9. The tenants are persons who would be entitled to compensation under S. 3. They have made their applications within 15 days aftr the date of the coming into force of the Act, and they have made their applications to the proper Court, namely,

1. (1902) I L R 26 M 91. 2. (1908) I L R 31 M 268.
3. (1916) I L R 40 M 259 32 M L J 477. 4. (1914) 20 C L J 107.
5. (1905) A C 383. 6. (1922) 44 M L J 271 : 46 M 836.

Kanniappa Chettiar v. Ramachandra Aiyar

Sir Walter Salis Schwabe, C. J.

this Court, in which the suits were then pending. In my judgment, if there had been no appeal pending, they could properly have made their application to the City Civil Court, because in my view, it was the intention, and must have been the intention of this Act that, after the decree but before the execution at any time, application could be made to the Court having had control of the suit.

It follows from what I have said that I do not agree with the decision in A. A. O. No. 182 of 1922*. I do not think that it makes any difference that the decree of the City Civil Court in that case had been affirmed by this Court, so long as the decree had not been executed.

Under S. 9 we have to fix the price according to the market-value of the land on the date of the order and for this purpose " land " means " the interest in the land and all other interests which the lanlord can convey under any power." For the assistance of the Court in fixing that value, this matter must be referred to some suitable person. The principle of the valuation in such a case will be to ascertain the market-value of the plaintiff's interest in the land as on the date of the order, that is, to-day. In arriving at that market-value, he will have to take a reasonable rent from the day of the expiration of the notice to quit until to-day, and then to capitalize the value of the rent for the remainder of the plaintiff's term, *less*, of course, the amount of rent for the balance of the term which the plaintiff had to pay to his superior landlord and which will now become payable by the tenants. He will take into account any enforceable power to renew that the plaintiff may have.

The question of mesne profits which we propose to remit to the City Civil Court will become unnecessary for decision in the event of the price fixed for the land being paid, and therefore the further hearing before the City Civil Court must be stayed pending the final disposal of the petitions under S. 9.

The appellants have succeeded in this appeal. It is true that the main part of the argument has turned on the petitions, but they were entitled to come here and complain that an order for mesne profits was made against them which was wrong, and the usual result will follow that the first respondent must pay the costs of the appellants—one set. It might have been

*Latifa Bi v. Mottai Ammal Since reported in 46 M 836 44 M L J 271.

Kanniappa Chettiar v. Ramachandra Aiyar — Sir Walter Salis Schwabe, C. J.

a case where we should order less cost to be paid but for the fact that the first respondent has refused to admit the right of the appellants under S. 9, and it is by reason of that refusal that this appeal has really been substantially fought.

The appellants have brought the superior landlord before the Court quite unnecessarily and quite wrongly, and they must pay for having done so his costs—one set.

The further consideration of the petitions will be adjourned until Monday the 8th instant. The question of costs on the petitions is reserved.

Wallace, J.

Wallace, J. :—I agree. I only wish to say a word or two on the interpretation of Ss. 9 and 10 of Act III of 1922. S. 10, as I read it, is intended to introduce into the obligation for compensation by landlords to tenants, a similar species of relief proceeding parallel with the trial of the suit and postponing the obtaining of a decree or preventing its execution when obtained, as S. 9 applies to the privilege granted to tenants to purchase the landlord's right. S. 9 obviously applies to pending suits, otherwise a reference to a *summons* is unmeaning, and it also applies to suits in which decrees have been passed but not executed, as sub-S. (3) clearly indicates. It therefore applies to both the stages of suits which are contemplated also by S. 10. I therefore must disagree with the judgment of Spencer and Venkatasubba Rao, JJ., in A. A. O. No. 182 of 1922* in so far as they interpret the omission of S. 9 in S. 10 as implying that S. 9 cannot apply to suits in which a decree has been passed before the Act came into force, although not executed. The whole object of S. 9 appears to me to be to allow the tenant who is liable to ejectment, whether under a decree or not, to purchase the landlord's right. So long as the decree for ejectment has not been executed, what the reasons for non-execution may be and whether or not they were due to an application by the tenant himself for stay of execution do not matter and cannot affect the applicability of the section.

In the present case, S. 9 in terms applies. There are suits instituted against the defendants and decrees which have not yet been executed ; and there are applications put in by them, within 15 days of the coming into force of the Act, to the Court, that is this Court, before whom the suits (in their stages as appeals) were then pending. Therefore the defendants

*(1922) 44 M L J 271 46 M 836.

Kanniappa Chettiar v. Ramachandra Aiyar — Wallace, J.

are fully entitled to take full advantage of S. 9 and have their applications under S. 9 heard and determined.

I therefore fully agree with the order proposed by the learned Chief Justice.

[These petitions came on for final hearing after submission of the Official Referee's report on 14th December, 1923.]

These Petitions coming on for further hearing on Monday, the 8th January 1923, the Court made the following

ORDER :—The parties having failed as to price of the lands, we refer the matter to the Official Referee to fix the price of the lands, on the principles laid down in this judgment and to report to us accordingly.

S. E. Sankara Aiyar for petitioners in all.

Mr. K. Ramachandra Aiyar, 1st defendant in person.

The Court delivered the following

Sir Walter Salis Schwabe, C. J.

JUDGMENT :—*The Chief Justice.*—These appeals were remanded, for a finding to the Official Referee and they come to us on report. The relevant facts are that the trustee of a temple granted a lease to the 1st respondent of certain building lands, and he sub-let part of these lands to the petitioners. On an attempt to eject the petitioners by the respondent, the petitioners under the Madras Act, III of 1922, which had come into operation meanwhile, claimed to purchase the Respondent's interest and the matter was referred to the Official Referee to determine what the value of the Respondent's interest in the land was.

The Official Referee has reported and he has fixed the proper annual rent of the property ; he has deducted therefrom what he considers a proper proportion of the rents, rates, etc., payable to the superior landlord, the trustee of the temple, appropriate to the petitioners' portions of land ; he has capitalized the amount payable on a 7 1|2 per cent. basis. In respect of the last I do not agree with the basis on which he has capitalized. I think that in a matter of this kind, a 6 per cent. basis is quite sufficient, as the amount of the Court interest allowed is about the amount that can be obtained by investing in Government securities and I see no reason at all why in arriving at a figure in a case of this kind we ought to assume that the person receiving money will invest it at a higher rate of interest in some speculative form of investment. As regards the deduction of amount for rents, rates, etc., payable to the superior landlord, it is not at all

Kanniappa Chettiar v Ramachandra Aiyar

Sir Walter Salis Schwabe, C. J.

clear that it is a proper deduction to make, because there is no provision in the Act under which the superior landlord can be made to look to the sub-tenant who is taking over part of the interest of the tenant and, in the absence of an agreement by the superior landlord, the tenant would be left to pay him at any rate the rent in respect of those portions. This is merely a matter of adjustment. If that liability is to be left totally on the shoulders of the tenant, it is obvious that the sub-tenant cannot, in arriving at the amount payable by him for compensation, have the sum worked out on the basis that these amounts would be payable by him. However, we are informed that it is possible that the superior landlord will come to terms with these tenants under which he will take the rents, rates, and such like payments from them and relieve the tenant *protanto.* This case had better, therefore, be adjourned to Monday next to see if any and what terms could be come to in that respect.

That leaves an important question and that is whether the lease by the temple trustee being for 21 years with an option to the tenant to renew it at the end of the 21 years at an enhanced rent is good or bad. It has been held by the Official Referee that the second 21 years, that is to say, the option period, is not to be taken into consideration in arriving at the compensation, because in his view that option is bad in law on the ground that the trustee had no power to enter into a lease for that period, as he looks upon it as a lease for a period of 42 years with liberty to the tenant to determine it at the expiry of 21 years, and holds that the lease is void. I do not agree with him. The question to be determined in such cases is whether it is a lease that a prudent man would make under the circumstances in the interests of himself if it were his own property, or in the interests of others if he was doing his best for them. The Indian Trusts Act provides in the case of ordinary trustees for the length of lease which they may grant and this lease is for a period longer than would be allowable under that Act, but that Act expressly does not include trusts like the present trust. It may be a very good guide in arriving at the answer to the question whether this was a proper agreement to enter into because one would assume that the legislature in fixing a period as between an ordinary trustee and a *cesti qui trust* was considering what was reasonably a prudent thing for a trustee to do with trust property. But in this case there is an element which comes into consideration which does not appear

Kanniappa Chettiar v. Ramachandra Aiyar — Sir Walter Salis Schwabe, C. J.

to have entered into the consideration of the legislature in passing the Indian Trusts Act and which, in my Judgment, removes this case outside any consideration based on that Act altogether and that is that the lease in question was a building lease. The whole object of the lease was to turn agricultural or undeveloped land into building land, that the tenant under the lease should build upon the land and pay an enhanced rent over and above the agricultural rent because he was going to build upon it, and that at the determination of the tenancy the structure should fall in to the landlord at a valuation. It is obvious that no one is going to enter into an agreement of that kind unless he has a reasonable time before him to make it remunerative ; and so we find in England that it has been held as regards trustees who are letting any land for building purposes on a ground rent that the minimum period is 60 years and the maximum 99 years. Here where we are dealing with town property we find that the trustee enters into an agreement for 21 years with an option of renewal at an enhanced rent for 21 years. I can find nothing unreasonable or unlawful in the transaction at all, and I am quite clear that the option that he has granted in this case is perfectly valid, and that being so, it is necessary that the option of 21 years should be valued. In arriving at that valuation I think we must first enquire what the rental value of the land is. With some hesitation I have come to the conclusion that the Official Referee's figure is the right one. The matter was before him ; he saw this land and enquired into the matter; and though I am clear that he has not erred on the side of liberality, I think there is not enough for us to distrub his finding in that respect. Therefore we must take the same rate as he has taken for the period down to the end of 21 years for the option period. Then again, that will be subject to the question which is still left open as to whether it is to be reduced or not by reason of the amounts for rents, rates, etc., which are payable to the landlord and that will again have to be capitalized on the same basis that I have held is right in respect of the other sum, that is, 6 per cent. As, however, this decision is not binding upon the superior landlord and it will be open to him, if he is so advised, notwithstanding this Judgment to litigate the question as to whether this option is good or bad, it has been agreed between the parties that the amounts found due for the 21 years period shall be paid into Court and invested, that the income thereof shall be paid to the 1st respondent until the renewal has been granted, or it has been finally

Kanniappa Chettiar v. Ramachandra Aiyar — Sir Walter Salis Schwabe, C. J.

decided that the trustee is not bound to grant it, and that the amount shall be paid out to the 1st respondent or in proper proportion to the petitioners if and when that course becomes possible by reason of the final determination of that matter. By reason of this amount remaining in Court there must be liberty to apply to City Civil Court. The compensation for the other period will, of course, be paid to the 1st respondent. No order as to costs.

Wallace, J.—I agree. Wallace, J

S. E. Sankara Ayyar for the petitioner.

Mr. K. Ramachandra Ayyar, 1st respondent in person.

The Court made the following

ORDER :—The parties have now come to an agreement on the basis of our preliminary Judgment of December the 14th. That agreement signed by the vakil for the appellant and by the 1st respondent with the statement of account annexed will be filed and the decree drawn up accordingly. There will be liberty to apply to the City Civil Court in respect of this matter generally.

T. S. V.

[FULL BENCH.]

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE, K. C., *Chief Justice,* MR. JUSTICE COUTTS TROTTER, MR. JUSTICE RAMESAM, MR. JUSTICE WALLACE AND MR. JUSTICE WALLER.

Meyyappa Chettiar *Petitioner* (Counter-petitioner).*

v.

Chidambaram Chettiar *Respondent (Petitioner).*

(F. B.) Meyyappa Chettiar v. Chidambaram Chettiar

Civil Procedure Code, O. 21, R. 57, O. 38, Rr. 8 and 11—Attachment before Judgment—Decree subsequently passed in the suit—Execution of the decree—Dismissal of execution petition owing to the default of decree-holder—Attachment ceases.

Held, (by the majority of the Full Bench, Coutts Trotter, Ramesam and Waller, JJ., Schwabe, C. J. and Wallace, J. dissenting). Where a party obtained an attachment before Judgment and subsequently a decree was passed in his suit if his execution petition is dismissed for want of due diligence in presenting the necessary papers to the Court, the attachment of the property ceases.

The provisions of O. 21, R. 57 apply to attachment before Judgment which become converted into attachment in execution when application is made to execute the decree passed in the suit.

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*C R P No. 796 of 1921. 17th December, 1923.

(F. B.)
Meyyappa Chettiar
v.
Chidambaram Chettiar

An attachment before Judgment becomes an attachment in execution when an application for executing the decree is made and admitted.

Venkatasubbiah v. *Venkata Seshaiya* I L R 42 M 1 overruled.

Arunachalam Chetti v. Periasami Servai, I L R 44 M 902 : 41 M L J 256 followed.

Held, by Schwabe, C. J. and Wallace, J. : The provisions of O. 21, R. 57 do not apply to cases of attachments before Judgment.

Per Wallace J. : An attachment before Judgment under O. 38 of the Civil Procedure Code only comes to an end by a formal order withdrawing it.

Petition under S. 115 of Act V of 1908, praying the High Court to revise the Order of the Court of the Subordinate Judge of Ramnad at Madura, dated 30th March, 1921, in E. A. No. 285 of 1920 in E. P. No. 142 of 1920 (in O. S. No. 124 of 1914 on the file of the Temporary Subordinate Judge's Court of Ramnad).

K. V. Krishnaswami Ayyar and *K. Balasubramanya Ayyar* for the petitioner.

C. S. Venkatachariar and *A. Swaminatha Ayyar* for the respondent.

March 6 and April 10, 1923. The Court (Ramesam, J.) made the following

ORDER OF REFERENCE TO A DIVISIONAL BENCH :—

The facts are not fully stated by the Subordinate Judge. They are as follows :—

The respondent in the High Court (petitioner in the Court below) filed O. S. No. 153 of 1914 in the Subordinate Judge's Court of Ramnad, and in I. A. No. 592 of 1914 obtained an order for attachment before judgment of 16 items of properties belonging to the defendant. The properties were attached on 20—11—1914. The suit was then transferred to the Additional Subordinate Judge's Court and was numbered as O. S. No. 124 of 1914. A decree was passed on 22—2—1915. By the order on E. A. No. 4 of 1916 the decree was transferred for execution to the Subordinate Judge's Court of Ramnad. The decree-holder then filed E. P. No. 183 of 1916 and notice was issued to the defendant. The petition was dismissed on 19—9—1916 as the petitioner did not file an encumbrance certificate. The filing and dismissal of E. P. No. 183 of 1916 is not mentioned by the Subordinate Judge. As, under O. 38, R. 11, Civil Procedure Code, a re-attachment is unnecessary, it must be taken that E. P. No. 183 of 1916 was filed on the basis of the attachment before Judgment. If O. 21, R. 57,

(F. B.)

Meyyappa Chettiar v. Chidambaram Chettiar

C. P. Code, applies to such attachments, the effect of the dismissal of E. P. No. 183 of 1916 is that the attachment ceased. Then E. P. No. 129 of 1918 was filed on 19th July, 1918 and the properties were again attached, but on 29—4—1919 the petition was dismissed as batta was not paid for items 13 to 16 and as there were no bidders for items 1 to 12. E. P. No. 136 of 1919 was then filed. The properties were again attached on 19th July, 1920. As there were no bidders at the sale the petition was struck off and the attachment of 19th July, 1920 was kept alive for 4 months. The next petition for execution was filed on 12th October, 1920 within the four months allowed.

The petitioner in the High Court first obtained a decree against the same defendant *ex parte*. The defendant applied to set aside the *ex parte* decree and it was set aside on condition of his giving security. The sixteen items in question were given as security on 15th March, 1915. If the attachment before Judgment made by the respondent is subsisting, and if the execution petition of 12th October, 1920 is filed in pursuance of that attachment, the security will be subject to that attachment and cannot prevail against the rights worked out in that execution. In this view, the lower Court's order would be right.

But it seems to me (1) that the attachment before judgment is not subsisting. The lower Court relied on *Venkatasubbiah* v. *Venkata Seshaiya* (1), where it was held that O. 21, R. 57, C. P. Code, does not apply to attachments before Judgments. But it seems to me that the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1), requires reconsideration after the Full Bench decision in *Arunachalam Chetty* v. *Periasami Servai* (2). According to the reasoning of the latter case, when an application for execution is filed on the basis of attachment before Judgment, the attachment before Judgment must be deemed to be an attachment in execution of a decree. If so, O. 21, R. 57, applies. This conclusion seems to be reasonable. This is the view taken by the respondent himself when he obtained re-attachments in 1918 and 1920. Secondly, it is true that the security cannot prevail against all rights pursuable under the old attachment. The last execution petition was based on the attachment of 1920. If so, the security is not subject to any rights. (See my Judgment referring the case to a Full Bench in Appeal No. 36 of 1920).

1. (1918) I L R 42 M 1. 2. (1921) I L R 44 M 902 : 41 M L J 256 (F B).

(F. B.)

Meyyappa Chettiar v. Chidambaram Chettiar

I therefore refer this Revision Petition to a Division Bench for disposal.

K. V. Krishnaswami Ayyar and *K. Balasubramania Ayyar* for the petitioner.

C. S. Venkatachariar and *A. Swaminatha Ayyar* for the respondent.

July 12, 1923. The Court (Spencer and Devadoss, JJ.) made the following

ORDER OF REFERENCE TO A FULL BENCH :—

Spencer, J.

Spencer, J. :—The question for decision is how the provisions of O. 21, R. 57, are to be reconciled with those of O. 38, R. 11, C. P. Code.

One method is to understand O. 38, R. 11, as applying only to the first execution taken against property attached before Judgment. Another is to treat the attachment mentioned in O. 21, R. 57, as not including attachment before Judgment, which will then continue until the decree is satisfied. Consistently with my Judgment in *Arunachalam Chetty* v. *Periasami Servai* (2), I prefer the former view, and this seems to be the opinion of Ramesam, J., as he observes in his reference to the Divisional Bench that the conclusion that an attachment before Judgment should be deemed to be an attachment in execution of a decree is reasonable, and he further adds that the security in this case was not subject to any rights arising out of the attachment of 1920, thus implying that the attachment before Judgment was not kept alive for the purpose of subsequent attachments after the first attachment after the passing of the decree had ceased owing to the dismissal of the execution petition.

I think that the words "the attachment" in O. 21, R. 57, mean the attachment in execution in which the attachment before Judgment became merged by virtue of O. 38, R. 11, *i. e.*, the first attachment after the passing of the decree.

But it has been held by a Bench of this Court in *Venkatasubbiah* v. *Venkata Seshaiya* (1), that an attachment before Judgment does not cease to have effect because of the dismissal of subsequent applications for execution for default of prosecution, and this decision is not consistent with the above view.

The question, however, is not an easy one for decision and it is important that it should be decided finally as it is likely to arise in other execution petitions. We refer the question

2. (1921) I L R 44 M 902 : 41 M L J 256 (F B). 1. (1918) I L R 42 M 1.

(F. B.)
Meyyappa Chettiar
v.
Chidambaram Chettiar
Devadoss, J

whether the attachment before Judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on 19th September, 1916, to a Full Bench.

Devadoss, J. :—I agree to the reference as the question is not one free from difficulty though I am of opinion that *Venkatasubbiah* v. *Venkata Seshaiya* (1) has been rightly decided.

K. V. Krishnaswami Ayyar and *K. Balasubramania Ayyar* for the petitioner.

C. V. Ananthakrishna Ayyar and *A. Swaminatha Ayyar* for the respondent.

Oct. 22, 24, 1923. The Court made the following

ORDER :—We propose to call on the Court of the Subordinate Judge of Ramnad at Madura to produce to this Court the execution records in O. S. No. 124 of 1914. Further consideration of this reference will be adjourned pending receipt of those papers.

[On receipt of the Records]

This petition came for hearing on Tuesday, the 6th day of November, 1923.

K. V. Krishnaswami Ayyar (*K. Balasubramania Ayyar* with him) :—The facts of this case are not in dispute. The question before your Lordships is whether in this case, the respondent who is the decree-holder in O. S. No. 124 of 1914 and who got an attachment before Judgment on 20—11—1914 is entitled to rateable distribution as against the petitioner who is the decree-holder in O. S. No. 108 of 1914. The petitioner, at first obtained an *ex parte* decree and on the Judgment-debtor giving security for the performance of the decree on 15—3—1915 of the same properties attached before Judgment by the respondent, the *ex parte* decree was set aside. The petitioner obtained a decree on contest on 15—11—1915. He filed E. P. No. 32 of 1920 on 6—2—1920 in execution enforcing the security and got an order for sale and permission to bid and set off his decree amount. The respondents, in the meantime, put in E. P. No. 183 of 1916 to execute his decree but this was dismissed for default of filing sale papers, etc., on 19—9—1916. He again put in petitions for execution which were dismissed and finally put in the present petition for rateable distribution of the sale proceeds, when realised, in E. P. No. 32 of 1920 and for directing the petitioner to deposit the money into Court without setting off towards his decree.

1. (1918) I L R 42 M 1.

(F. B)

Meyyappa Chettiar v. Chidambaram Chettiar

The lower Court has granted this petition and held that the security given to the petitioner was void as against the claim of this respondent enforceable under the attachment before Judgment, which remained in force up to date even after the dismissal of E. P. No. 183 of 1916, and as O. 21, R. 57, C. P. Code does not apply to attachments before Judgment, the attachment of 20—11—1914 is unaffected by the dismissal of E. P. No. 183 of 1916.

This petition is to revise this order of the Sub-Judge. If the attachment of 20—11—1914 ceases with the dismissal of E. P. No. 183 of 1916, then the security is valid as the claim of the respondent will not be one under this attachment and will not be hit at by S. 64 which refers only to " claims enforcible under the attachment. " Then, the petitioner will be entitled to enforce his security and set off his decree amount. Therefore the only question to be decided here is whether the provisions of O. 21, R. 57, C. P. Code apply to the attachment in this case. Hence the reference to your Lordships.

My first proposition before your Lordship is this: When a decree-holder, who had obtained an attachment before Judgment, puts in an application for execution of his decree, the attachment before Judgment enures for the benefit of the decree-holder and becomes an attachment in execution of the decree. This is made clear by reference to O. 38, R. 11.

That section speaks of a " re-attachment " and proceeds upon the principle that the attachment before Judgment becomes an attachment in execution as soon as an application for execution is made. This is also the view taken of this section in the following decisions in I. L. R. 33 Cal. 639 at page 643, 12 Bom. 400 and 26 Mad. 673 at page 677.

This view is also consistent with principle. Attachment before Judgment or after Judgment is only a name or designation. The manner of attaching and the legal effect of attachment in both cases is the same. In a pending suit, it is called attachment before Judgment, and it is called an " attachment in execution " when execution proceedings are started.

So my contention is that the clause in O. 21, R. 57, C. P. Code ' when any property has been attached in execution of a decree " may be paraphrased as " is in a state of attachment in execution " and, therefore, includes the case of an attachment before Judgment which has become in the eye of law, an attachment in execution.

(F. B.)

Meyyappa Chettiar v. Chidambaram Chettiar

Therefore O. 21, R. 57, C. P. Code applies to attachments before Judgment.

Secondly, in the other provisions of this Code, the phrase attached in execution " in similar circumstances has been held to include attachment before Judgment. Reference may be made to S. 63 and 1 C. L. J. 97 : 29 Cal. 773, 31 All. 527 and 17 M. L. J. 488, *per* Subrahmania Aiyar, J.

In the Code of 1859, there was no corresponding provision as O. 38, R. 11. There was, then, a conflict of rulings in the High Courts, whether a new attachment was necessary or was not necessary as the attachment before Judgment becomes an attachment in execution. See 13 W. R. 9 (F. B.) and 1 N. W. P. 172, 188. Coming to the case-law on the point. S. 490 of the Code of 1882 and now O. 38, R. 11 has been to put in to settle this conflict and the reason given for holding that the re-attachment was not necessary must be taken to have been approved by the Legislature.

The only decision against me is 16 C. L. J. 86 which I contend is wrong. The other decisions in 1 L. W. 932 and 26 M. L. J. 215 do not touch the point and the decision in 42 Mad. 1 is wrong in saying that the matter is concluded by a series of decisions on the point. It must be held to stand or fall by 16 C. L. J. 86 which it follows.

On the other hand, the reasoning of the Full Bench in 44 Mad. 92 is in my favour and though it is a decision on the question whether Art. 11 of the Limitation Act applies to attachments before Judgment, yet it is a decision on an exactly similar phase in Art. 11 and the ratio of the decision supports the principle, I contend for.

C. V. Ananthakrishna Iyer for respondents (*A. Swaminatha Iyer with him*) :—

I contend that O. 21, R. 57, being a penal provision must be strictly construed, and the phrase " attached in execution " must not be given extended operation. Attachment before Judgment is quite a different thing and is governed and regulated by the special provisions of O. 38 which is complete in itself. See O. 38, R. 12. See also Appendix D, Form (5) which is quite different from that for attachment in execution. See Appendix E, Form 24 etc. The decisions interpreting O. 21 R. 57 are all in my favour. See 16 C. L. J. 86 and 42 Mad. 1 and there is no decision against me. 44 Mad. 902 (F. B.)

(F. B.)

Meyyappa Chettiar v. Chidambaram Chettiar

does not touch the present point at all and the Judges there expressly say they do not concern themselves with O. 21 R. 57.

K. V Krishnaswami Aiyar in reply :—

Appendix D, Form (5) is not at all different. It is only a direction to the bailiff and that is why it is worded like that. The two attachments are effected in the same manner and both do not operate as a charge on the property.

The Court expressed the following

Sir Walter Salis Schwabe, C. J.

OPINION :—*The Chief Justice* :—The respondent obtained an order for attachment before judgment of certain immoveable property of the judgment-debtor. The petitioner having obtained a decree *ex parte* against the same judgment-debtor, it was set aside on the latter's application on security being given to the petitioner, and as security, a charge was given over the property attached by the respondent. In due course the respondent obtained a decree as also did the petitioner, and there were other decrees against the same judgment-debtor by other persons. The respondent took out an execution petition in 1916, which came before the Court on several occasions, being adjourned from time to time for the respondent to file the necessary papers, which included an encumbrance certificate. These papers not having been produced, the petition was on the 29th of August 1916 adjourned to the 19th September next for filing the papers, and on that date, the papers not having been filed, the petition was dismissed. Subsequently, the respondent attempted again to bring the property to sale, but this was objected to by the petitioner on the ground that the dismissal of the execution petition in September 1916 put an end to the attachment before judgment, and that therefore the petitioner's security over the property prevailed over the claim of the respondent and the other judgment-creditors, who would but for this security given to the petitioner be entitled to rateable distribution under the rules. The Subordinate Judge has decided against this view and has ordered rateable distribution. The petitioner has brought this Civil Revision Petition, which was ultimately referred to this Full Bench.

The question to be decided is whether the words " property attached in execution " in O. XXI, R. 57, include " property

(F. B)

Meyyappa Chettiar v. Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

attached before judgment, when there has been a decree followed by an execution petition for the purpose of bringing the attached property to sale ; for so, by the words of that Rule, upon the dismissal of the application for execution by reason of the decree-holder's default rendering the Court unable to proceed further with the application for execution, the attachment ceases. It was argued before us that there has been no default within the meaning of the Rule. But it would seem clear that the Court required papers to enable it to proceed further with the application for execution, and the hearing was adjourned to enable the respondent to file the necessary papers, and it was dismissed because he failed to do so, and I think that that amounts to a dismissal by reason of the decree-holder's default within the meaning of the rule.

But there remains the important question whether, when the attachment is an attachment before judgment, the effect of the dismissal is to put an end to that attachment. The penalty imposed by R. 57 is very serious indeed, and, if it applies to an attachment before judgment, the effect of the dismissal of the application would be to give the petitioner, who took his security after the attachment, precedence over the respondent and all the other decree-holders who would otherwise be entitled to rateable distribution; and I cannot believe that so serious a penalty would have been imposed for what may have been the negligence of a vakil or delay caused by some difficulty in obtaining the necessary papers; and I have little doubt that the Court dismissing the petition had not the least idea that the effect of such a dismissal would be to impose such penalty. Indeed the law had by that time been declared in *Venkatasubbiah* v. *Venkata Seshaiya* (1), to be that the dismissal of an application for execution for default had no effect upon attachments before judgment. Although the obvious injustice in this particular case of holding that the attachment before judgment ceases is not a proper matter for consideration, yet the serious injustice that may follow generally on deciding in one way, and the fact that third parties' interests may be affected without their having an opportunity to intervene, are legitimate considerations in arriving at the true interpretation of the rule, if the rule is open to alternative constructions. The rule is a penal one and the principle that is applicable is that the matter

1. (1918) I L R 42 M 1.

(F. B.)

Meyyappa Chettiar v. Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

in question must be brought within the operation of the rule in express terms, or at least by necessary implication. Now, in terms, the rule applies to property attached in execution, and that expression does not include property attached before judgment. But it is argued that property which has been attached before judgment becomes property attached in execution, and ceases to be property attached before judgment, once proceedings are taken to bring that property to sale in execution. But I can find nothing in the Code to justify that view. It is true that, where property has been attached before judgment under O. XXXVIII, R. 11, no fresh attachment is necessary after decree for the purpose of selling the property. But that, in my judgment, does no more than provide that in such a case there need be no attachment in execution, and that the Court having by reason of the attachment before judgment got control over the property can proceed with the sale. In other words, what the Code permits is that the attachment before judgment can be used, in order to enable the Court to hand over possession of the property to the purchaser at Court auction. Attachment before judgment and attachment in execution are essentially different.

There is nothing remarkable in their being a penalty imposed for failure to proceed expeditiously in the case of property attached since decree, without a similar penalty being imposed when the property is attached before Judgment, because the penalty would be much more serious in the latter case. It would involve the letting in of all alienations subsequent to the attachment to the exclusion of all other decree-holders, and there is nothing unusual in such alienation by way of security for some other claimant as in this case or otherwise, the alienee taking only the risk of the particular creditor who has attached before Judgment, subsequently obtaining a decree which is not otherwise satisfied whereas in the case of attachment after decree an alienation between the attachment and dismissal of the execution petition is most improbable, and at the worst such dismissal enables the judgment-debtor to alienate before the decree-holder can re-attach, and, although there have been cases where that has been attempted, such as *Reddi Venkatasubbiah* v. *Tangator Subbiah* (3) and *Venkiteswarayyan* v. *Aswatha Narayanan* (4), it is not unaccompanied by risk as was demonstarted in those two cases. It is clear from a comparison of

3. (1915) M W N 159. 4. (1923) 45 M L J 315.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

O. 38 with O. 21 that the framers of the Code considered what provisions of O. 21 should be applied to attachment before Judgment, and I see no reason at all to suppose that it was intended to impose this penalty in cases of attachment before Judgment. If it had been intended, it could have been done quite simply by adding the words " or attachment before Judgment " in O. 21, R. 57. Attachment before Judgment is one of the headings of O. 38, which contains a Code dealing with that form of attachment, which differs in many features from attachment in execution dealt with under O. 21. For instance, the provisions of Rr. 7 and 9 of O. 38 have no application to attachments in execution ; and R. 12, dealing with agricultural produce, differs materially from R. 74 of O. 21 dealing with the same subject ; R. 7 provides that the manner of attachment in the two cases shall be the same and R. 8 applies the rules of O. 21 relating to the investigation of claims to cases of attachment before Judgment, and thereby clearly indicates that the Code looks upon the two attachments as being different things. Much reliance is placed by the petitioner on R. 11 but, as I have pointed out, all that the rule says is that, where property has been attached before Judgment, and it is desired to execute the decree upon it, it will not be necessary to go through the formality of re-attaching the property, and it does not say that the original attachment before Judgment shall become or be deemed to be an attachment in execution, which words, in my judgment, would be necessary to make it an attachment in execution within the meaning of O. 21, R. 57, or to make one form of attachment merge inextricably in the other. Further, it is worth noticing that the statutory forms in the Appendix for the two forms of attachment are quite different, for, by Form No. 7 of Appendix F, the order made for attachment before Judgment is addressed to the Bailiff and directs him to hold the property until the further order of the Court, while the form of the order for attachment in execution in Appendix E-24, is addressed to the party, and is in the nature of a prohibition to him from transferring or charging the property until further order of the Court.

If the matter were *res integra,* I should without hesitation be prepared to hold that the attachment before Judgment lasts until the Court puts an end to it by an order to that effect, or until it is otherwise brought to an end by reason of any of the provisions of O. 38,but that it cannot by implication be brought to an end by an order under O. 21, R. 57.

F. B.

Meyyappa Chettiar v Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

Turning to the authorities, the point came directly for decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1) and in *Gones Chandra* v. *Banwari Lal* (5). Both in Calcutta and Madras it has been held under precisely similar circumstances to those of this case that the attachment before Judgment is not affected by the dismissal of an application under O. 21, R. 57. The Madras case purported to follow the Calcutta case and also two other decisions in *Bavuddin Sahib* v. *Arunachala Mudali* (6) and *Suraparaju* v. *Narasimham* (7). Neither of the two latter cases are authorities directly in point although they contain weighty *dicta* in favour of the view expressed in *Venkatasubbiah* v. *Venkata Seshaiya* (1) being correct. The principle has now been accepted by all the text books and I think it correct to say that, since he passing of the Code of 1908, which for the first time introduced the provisions of O. 21, R. 57, this has been the accepted view. I do not however think that the time has been long enough or the number of decisions sufficient—though probably the ruling has been followed in many unreported cases in the mufassal and here—to constitute a *curses curiae*, and so relieve us from having to decide the point, though the fact of its having been accepted as correct fortifies my conviction as to the true meaning of the rule. On the other hand there is a Full Bench decision in *Arunachalam Chetty* v. *Periasami Servai* (2), which is relied upon by the petitioner, and is no doubt responsible for this attempt to upset the existing practice. That case requires careful examination. The question actually before the Court was as to which article of the Limitation Act applied to suits by a person against whom an order had been made on a claim preferred to property attached before Judgment—such claim being made after an order for sale made in execution. Art. 11 of the Limitation Act imposes a limitation of one year from the date of the order for suits by a person against whom an order has been made on a claim preferred to property attached in execution. The Court held that that article applied to cases where the claim was preferred to property attached before Judgment if the claim was preferred after an order for sale in execution.

Wallis, C. J., with whom Oldfield, Kumaraswami Sastri and Ramesam, JJ., agreed, stated that the property attached

1. (1918) I L R 42 M 1. 2. (1921) I L R 44 M 902 : 41 M L J 256.
5. (1912) 16 C L J 86. 6. (1914) 26 M L J 215.
7. (1914) 1 L W 932.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

before Judgment does not become property attached in execution upon the passing of a decree for the plaintiff either within the meaning of Art. 11 or under O. 21, R. 57, and that O. 38, R. 11, merely enables the decree-holder to apply for execution without a fresh attachment. But he held that where an order for sale was obtained, that order proceeds on the footing that the property is to be considered as attached in execution by virtue of O. 38, R. 11, and that a claim put in after the order may properly be regarded as a claim to property attached in execution of the decree and therefore within Art. 11 of the Limitation Act. It is to be observed that this change which the Court held occurs in the nature of the attachment only comes into operation according to this judgment when an order for sale is obtained. It does not hold that this change occurs either on obtaining a decree or on making an attempt to obtain an order for sale by issuing an execution petition. The case is therefore not any authority in favour of the present contention, because in this case there has not been any order for sale. It may be if there had been such an order that the position would be different. This judgment points out the anomalous result that if a claim is made to property attached before judgment up to the order of sale, a suit by the party affected is barred in six years, whereas, if it is made after the order of sale, it is barred in one year, and suggests that the anomaly should be put right by legislation. Emphasis was placed in the judgment on the fact that, before the limitation provisions in such cases were removed from the Code of Civil Procedure and put into the Limitation Act in 1908, there was express provision that the limitation period of one year should apply both in the case of claims to property attached in execution and to property attached before judgment, and it was thought that the Legislature could not have intended in the process of removing a section from the Code of Civil Procedure to the Limitation Act to extend the limitation period. The Court, however, was driven to the conclusion that it had done so, but confined the extension within the narrowest possible limits. No such consideration applies to this case, as the penal provision of O. 21, R. 57, in question was, when enacted, entirely new. It is not without interest that the Court treated the meaning of O. 21, R. 57, as not germane to the matter then in issue and that I. L. R. 42 M. 1 and the cases there quoted were not even mentioned in argument. Spencer, J., delivered a separate judgment in which he says that, if a decree is passed and an

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Sir Walter Salis Schwabe, C. J.

attempt is made to execute it, what was an attachment before judgment becomes in effect an attachment in execution of a decree because O. 38, R. 11, declares that no re-attachment is necessary and, later on, he says he finds no difficulty in classing a claim put in after the properties were brought to sale in execution proceedings under the heading of "Claims preferred to property attached in execution of a decree," and he declined to express an opinion on the hypothetical case of a claim put in to property attached before judgment before the decree and the commencement of the execution proceedings. I doubt if he meant by his judgment to go further than the rest of the Court, and to extend the principle enunciated by them to claims made where there was a decree but no execution proceedings, or to claims made after execution proceedings had been commenced. If he did so intend, his observations were *obiter* and I prefer the judgment of the rest of the Court, which in my judgment strained the language of the article in question in going even as far as it did. However this may be, I find nothing in that judgment when carefully examined which militates against the view expressed in I. L. R. 42 Mad 1, which I think was rightly decided. As there has been no order for sale in this case, and nothing but an abortive attempt to obtain, and for that purpose to make use of an existing attachment, it is not necessary here to decide what the position would be after an order for sale had been obtained. I can find nothing in the rule to make the failure to proceed expeditiously with the execution petition involve the loss of all rights acquired by the attachment before judgment. I would answer the question in the affirmative.

Coutts Trotter, J.

Coutts Trotter, J.,—I regret that I am unable to agree. In matters of procedure it is obviously desirable that this Court, indeed, all the Courts of the country, should, as far as possible, speak with one voice. But in this matter we start with the situation that there are conflicting decisions of the various Courts of India and, as my Lord has said, it is not possible to contend that there is such a course of decisions either of this Court or of other Courts which would justify the attitude that, for the sake of uniformity, a result should be acquiesced in even although one thought it logically unjustifiable. I conceive that our business is to say, without reference to previous decisions, what we think to be the true interpretation of the provisions of the Code relating to the subject-matter of this reference.

F B.

Meyyappa Chettiar v. Chidambaram Chettiar

Coutts Trotter, J.

The point for our decision is a very short one, namely, whether a party who has obtained an attachment before Judgment and has subsequently had his execution petition dismissed for want of due diligence in presenting the necessary papers to the Court loses the priority that he had enjoyed by reason of his attachment before Judgment. If he has lost it, he has lost it by reason of the provisions of O. 21, R. 57, which runs as follows

" Where any property has been attached in execution of a decree but by reason of the decree-holder's default the Court is unable to proceed further with the application for execution, it shall " (among other powers) " dismiss the application. "

The Court in fact dismissed the application in this case. Then follow the words " Upon the dismissal of such application the attachment shall cease. " By O. 38, R. 11, it is provided as follows :—

" Where property is under attachment by virtue of the provisions of this Order and a decree is subsequently passed in favour of the plaintiff, it shall not be necessary upon an application for execution of such decree to apply for a re-attachment of the property. "

The whole point here is whether O. 21, R. 57, operates on an attachment which had been obtained before Judgment or is to be confined to an attachment first sought and obtained after decree and in execution of that decree. It is well settled that attachment creates no title in the decree-holder or the prospective decree-holder as the case may be. It is merely a process whereby the Court puts its hand on the property attached and keeps it in *custodia legis* until something else happens. It appears to me that O. 38, R. 11, provides that, when property has been attached before Judgment, it remains attached when in due course after Judgment the decree-holder applies for execution of his decree. It has resolved doubts alluded to in *Ramakrishna Das Surrowji* v. *Surfunnissa Begum* (8), as to whether after decree it might not be necessary for the attaching creditor to re-attach the property and it provides in terms that the property shall remain attached upon an application for execution of the decree. I am unable to see that there is any difference *in rerum natura* between an attachment before Judgment and an attachment in execution

8. (1880) I L R 6 C 129.

F. B

Meyyappa Chettiar v. Chidambaram Chettiar

Coutts Trotter, J.

of decree except that the one is prospective and, after the condition is fulfilled which brings it into active operation, namely, the obtaining of a decree, confers a priority in time. But an attachment before Judgment is not a remedy of a kind higher than, or different from, an attachment applied for and obtained for the first time in execution of a decree already passed. Language is used in some of the cases which might suggest that the mere passing of a decree converts an attachment before Judgment into an attachment in execution. I do not adopt that view for the reasons pointed out by Wallis, C. J., in *Arunachalam Chetti* v. *Periasami Servai* (2). The reasoning appears to be this—and I respectfully regard it as perfectly sound—that a decree-holder need not proceed in execution unless he chooses to do so, and it would therefore be absurd to say that an attachment is an attachment in execution when there is no execution. The turning point comes in my opinion when the decree-holder by filing an execution petition has shown that he means to execute his decree ; and I am myself unable to escape from what seems to me the logical conclusion that, when he has elected to proceed in execution, an attachment which he has obtained and on which he must necessarily base his petition and demand for sale, becomes automatically an attachment in execution. That seems to me to underlie the reasoning of the Judges in the Full Bench case to which I have referred, particularly of Spencer, J., with whom I find myself in complete accord. I think it is also implied in the reasoning of the Judgment in *Bavuddin Sahib* v. *Arunachala Mudali* (6). I confess I am not impressed by the argument that O. 21, R. 57, is a penal enactment which takes away rights which would otherwise exist and must therefore be construed *verbatim et literatim*. No common law rights are here involved. The whole position of the decree-holder and all his rights are alike the creatures of a bundle of statute-made provisions. The statute punishes lack of diligence on the part of the decree-holder. I am unable to see any logical reason why his lack of diligence should be punished only if he has attached the property after decree but excused if he attached it before decree. Nor do I think that the grammatical construction of O. 21, R. 57, can really bear the construction sought to be put on it. The words are " where any property has been attached in execution of a decree. " That I construe as meaning " where any property has been in a state of attachment in execution of

2. (1921) I L R 44 M 902 : 41 M L J 256. 6. (1913) 26 M L J 215.

F B.

Meyyappa Chettiar v. Chidambaram Chettiar

Coutts Trotter, J.

a decree" and not confined to cases where the first act of attachment was made subsequently to the decree. To put it in the technical language of grammar, I regard "has been attached" as a perfect and not an aorist tense. In my opinion, when a decree-holder having obtained his decree takes out an execution petition, he has, in effect, elected to take the benefit of O. 38, R. 11, and asks the Court to treat his attachment henceforth as an attachment in execution of the decree which he is seeking to execute. When he has made that election it seems to me that his attachment thereupon becomes subject to those requirements of diligence laid down by O. 21, R. 57. I cannot assent to the view that attachment before judgment and attachment in execution are two such wholly different things as to make any provision applicable in express terms to the one in no event applicable to the other; because, in my view, as soon as a decree-holder applies for execution on the strength of the attachment that he has obtained before judgment and which he seeks after judgment to use as validating the sale for which he is applying, he thereby by his own act asks the Court to treat his attachment as being an attachment in execution. I would therefore answer the question propounded in the negative.

Ramesam, J.

Ramesam, J.—The facts of the case were stated by me in the order referring the case to a Bench of two Judges and need not be repeated.

The question referred to the Full Bench is "whether the attachment before judgment in this case was subsisting after the dismissal of E. P. No. 183 of 1916 on the 19th September 1916."

The decisioin turns upon (1) whether O. 21, R. 57, ever applies to attachments before judgment and (2) if it does, under what conditions? The two questions are connected and will be discussed together.

They turn on the construction of the words "attached in execution of a decree" in O. 21, R. 57. If an attachment before judgment can ever become or be converted into an attachment in execution, the rule applies to an attachment before judgment after it is so converted into an attachment in execution. If such conversion is impossible, it does not.

In the Code of 1859 there was no provision corresponding to O. 38, R. 11, of the present Code. There was a conflict

F. B.
Meyyappa Chettiar v. Chidambaram Chettiar
Ramesam, J.

of opinion on the necessity of a re-attachment by a decree-holder who had obtained an attachment before judgment and who desired execution of his decree.

In Calcutta, it was held that attachment before judgment and attachment in execution were so entirely different in their nature that one cannot subserve the purposes of the other and it was necessary for such a decree-holder to re-attach the property for purposes of execution—*Sreeram Manick* v *Tincowree Roy* (9). The High Court of North West Provinces took a different view. Pearson and Turner. JJ., in *Sarkies, Agent of the Official Assignee of the Insolvent Court of Calcutta* v. *Mussumat Bundho Raee* (10), said "Futhermore, there is in our judgment no difference between the effect of attachment obtained before, and attachment obtained after decree. It is true that in the former case the plaintiff can only obtain an order for the attachment of specified property, whereas in the latter the decree-holder may obtain a general order for the attachment of the property of the judgment-debtor, wherever it may be found ; but the reason for this difference is to be found in the grounds on which the Court is authorized to grant attachment before judgment, that is to say, the probability of the disposal of the property, or its removal out of the jurisdiction of the Court. In both processes the orders directing attachment are to be carried out under the provisions of S. 233 and the following sections ; in both the claims of the third parties are to be similarly investigated under Ss. 246 and 247 ; and to both apply the prohibitions contained in S. 240, which prohibitions we hold to embrace all the consequences resulting from attachment, whether the order be made before or after judgment. When property has been attached by actual seizure or written order, any private alienation thereof, whether by sale, gift, or otherwise, is null and void." The legislature differing from the Calcutta view, and adopting the Allahabad view, enacted a section in the Code of 1877 similar to O. 38, R. 11, making a re-attachment unnecessary and the attachment before judgment available for purposes of execution. It is true that after the Code of 1877 was passed, the Privy Council held on the Code of 1859, that the attachment before judgment continues and cannot be regarded as abandoned by the then practice of re-attachment (*Ramkrishna Das Surrowji* v. *Surfunnissa Begum* (8) but this is immaterial.

9. (1870) 13 W R (F B) 9 (S C) : 4 Beng L R 63,67
10. (1869) 1 N W P H C R 81, 96, 97
8. (1880) I L R 6 C 129, 133. (P. C.)

F. B.
Mevyappa Chettiar v. Chidambaram Chettiar
Ramesam, J.

Now, O. 21, R. 11, provides that one of the modes in which assistance of the Court in execution is required is " by the attachment and sale, or by the sale without attachment, of any property." Sale without attachment is permissible only in a decree for sale. Therefore, in a decree for money, there must be an attachment in execution preceding the sale. In a case where there has been an attachment before judgment and no re-attachment (pursuant to the provision of O. 38, R. 11) where is the attachment in execution preceding the sale as required by O. 21, R. 11 ? The answer is that the attachment before judgment is such attachment in execution, having passed into the latter. In my opinion, the effect of O. 38, R. 11, is, though it does not say so in so many words, that the attachment before judgment becomes an attachment in execution when it is definitely sought to be made available for execution. This is the view taken in the Indian Courts and by the text-writers up to 1911. *In Pallonji Shapurji Mistry* v. *Edward Vaughan Jordan* (11), Scott, J., referring to S. 490 of the Code of 1882 (corresponding to O. 38, R. 11) said (at page 405) " The attachment before judgment enures and *becomes* an attachment in execution. That is the effect of the section." This was followed in *Sewdut Roy* v. *Sree Canto Maity* (12) by Woodroffe, J., who said, " on such application for execution, the attachment before judgment enures and becomes, upon and by virtue of the application, an attachment in execution." In *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13) Ghose and Brett, JJ., held with reference to S. 285 of the old Code (corresponding to S. 63 of the present Code) which contains the words " under attachment in execution of a decree." that the section applies to attachments before judgments also. Messrs. Amir Ali and Woodroffe in their first edition of the Civil Procedure Code at page 1156 say " He must apply for execution just like any other creditor (In the foot-note to this sentence, the decisions in I. L. R. 12 Bombay 400 and I. L. R. 33 Calcutta 639, were cited without any disapproval.) " This is now made clear by the words ' upon an application for execution of such decree.' Where, however, an application for execution is made by the terms of this rule, no application for attachment is necessary, the attachment before

11. (1888) I L R 12 B 400. 12. (1906) I L R 33 C 639 at 643.
13. (1902) I L R 29 C 773.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar.

Ramesam, J.

Judgment *enuring and becoming upon and by virtue of the application for* execution, an attachment in execution." In the foot-note they refer to *Bhugwan Chunder Kritiratna* v. *Chundra Mala Gupta* (13), and add, "In this respect, the law is now settled, etc." In *Durpati Bibi* v. *Ramrach Pal* (14), Banerji and Tudball, JJ., say, "so that, after the passing of the decree, the attachment already made was to be deemed to *be an attachment in execution of the decree.*" In *Ramasamy Udayar* v. *Chakrapani Chettiar* (15), there were two attachments before Judgment in two Courts and S. 285 was applied to them as in I. L. R. 29 Cal. 773. Subrahmanya Ayyar, J., said, 'the effect of S. 490, C. P. Code, is to put a person attaching before Judgment *in the same position as if he had attached after decree,* if a decree is passed in his favour." In *Krishnaswamy Mudaliar* v *Official Assignee of Madras* (16) (a decision of three Judges), the learned Judges, after stating that S. 490 of the C. P. Code provides that no re-attachment is necessary add "The case, therefore, *stands upon the same footing* as if the creditor had obtained his decree and had afterwards obtained an order of attachment." Thus, it is clear that the construction contended for by the petitioner has always been accepted up to 1911.

The first note of dissent from this view was struck in *Gones Chandra* v. *Banwari Lal* (5). The learned Judges (one of whom was Sir Cecil Brett) dissent from I. L. R. 12 Bom. 400 and I. L. R. 33 Cal. 639. The decision in I. L. R. 29 Cal. 773 (in which Brett, J., was one of the Judges) was not referred to nor is the closely connected question, the possibility of the conversion of an attachment before Judgment into one in execution, discussed. This decision was referred to in *Bavuddin Sahib* v. *Arunachala Mudali* (6), where their Lordships say "The other contention of the appellant, namely, that. . . . the present decree-holder converted the attachment before Judgment into an attachment in execution is not sustainable. *Such conversion can take place only if the decree-holder applies for sale of all the properties in execution of his own decree.* Whether such conversion will take place even in such a case may be questioned on the authority of

13. (1902) I C L J 97 : I L R 29 C 773. 14. (1909) I L R 31 A 527.
15. (1907) 17 M L J 488. 16. (1903) I L R 26 M 673.
5. (1912) 16 C L J 86 6. (1913) 26 M L J 215.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar.

Ramesam, J.

Gontes, Chandra v. *Banwari Lal* (5), but it is unnecessary to decide that question for the purposes of this case." This decision far from being an authority in favour of the respondent is, as the expression of an opinion, against him. It is true the last sentence above quoted leaves the point before us open. But the immediately preceding sentence indicates the view that the attachment before Judgment will be converted into one in execution on the application of the decree-holder for sale. The next case supposed to be in favour of the respondent is *Suraparaju* v. *Narasimham* (7). It does not appear from the facts that any application for execution was dismissed for default. There was no reference either in the argument or in the Judgment to O. 21, R. 57, or to the cases above discussed. The next decision relied on by the respondent is *Venkatasubbiah* v. *Venkata Seshaiya* (1). It purports to be based on 16 Cal. L. J. 86, 26 M. L. J. 215 and 1 L. W. 932. The last two decisions are scarcely authorities for it. So that, we have, as against the decisions and opinions that prevailed from 1869 to 1911, two decisions in 1912 and 1918 in favour of the respondent. In this state of the authorities we got the decision in *Arunachalam Chetti* v. *Periasami Servai* (4); here the question arose with reference to the words "attached in execution of a decree" in Art. 11 of the Limitation Act. A Full Bench of five Judges held that, after an order for sale was passed after the decree, an attachment before Judgment becomes an attachment in execution. Wallis, C. J., said referring to O. 38, R. 11 "This provision does not, in my opinion, enable us to say that property attached before Judgment becomes property attached in execution of a decree upon the *mere passing of a decree for plaintiff* either within the meaning of Art. 11 of the Limitation Act or O. 21, R. 57, already mentioned, as execution may never be applied for, but merely enables the decree-holder *to apply for execution by sale of the* attached property without a fresh attachment. Where, however, as in the present case, there is an order in execution for the sale of the attached property, that order appears to me to proceed upon the footing that *the property is to be considered as attached in execution by virtue of R. 11, etc.*" This was concurred by three other Judges (of whom I was one). Spencer, J., though he may be regarded as going further than

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5. (1912) 16 C L J 86.

7. (1914) 1 L W 932. 1. (1918) I L R 42 M 1.

4. (1921) I L R 44 M 902 : 41 M L J 256 (F B).

F. B.

Meiyappa Chettiar v. Chidambaram Chettiar

Ramesam, J.

the others, certainly agreed with them to the extent that, at least after the order for sale, the attachment before Judgment becomes one in execution. The Judgment is therefore an unanimous Judgment of five Judges laying down an attachment before Judgment may be converted into an attachment in execution of a decree and is binding on this Court ; and when we remember that the Limitation Act and Civil Procedure Code are allied General Acts (first passed together in 1859, again in 1877 and again in 1908) and ought to be construed consistently [See *Phoolbas Koonwar* v. *Lalla Jogeshar Sahoy* (17) and *Arunachalam Chetty* v. *Periasami Servai* (2)], it is seen that it will be a great anomaly without any justification if the same expression is construed in one way in S. 63 of the Civil Procedure Code and Art. 11 of the Limitation Act and in another way for O. 21, R. 57, of the C. P. Code. If the character of an attachment before Judgment is such that its conversion into an attachment in execution is impossible, such impossibility exists equally for the purpose of S. 63, C. P. C., and Art. 11 of the Limitation Act as for O. 21, R. 57. Unless there is a clear indication to the contrary in one or more of these provisions, the possibility of such conversion equally applies to all and I see no reason to depart from I L R 44 Mad. 902, which definitely established the possibility of such conversion.

I do not feel it necessary to discuss the interpretation of O. 38, R. 9. I agree with the decisions in *Ram Chand* v. *Pitam Mal* (18) and *Abdul Rahman* v. *Amin Sharif* (19), that, when a suit is dismissed the attachment before Judgment terminates without an order of the Court. But even if the opposite view is the correct view, I do not think this has any bearing on the construction of O. 21, R. 57. While O. 38, R. 9, provides for one mode of terminating an attachment before judgment, it is not the only mode and it does not stand in the way of construing O. 21, R. 57, as providing another.

Nor do I think any assistance can be derived from the Form 7 in Appendix F of the Code. Appendix E, Form 24, which also seems to imply that a further order of the Court is necessary to put an end to the custody of the Court in an attachment after Judgment, may seem to be inconsistent with

17. (1875) I L R 1 C 226 at 242 (P C).
2. (1921) I L R 44 M 902 at 909.
19. (1918) I L R 45 C 780.
18. (1888) I L R 10 A 506 : 8 A W N 195.

F. B.
Meyyappa Chettiar v Chidambaram Chettiar.
Ramesam, J.

O. 21, R. 57. I think the true view is that the Forms have nothing to do with the rights of parties but only deal with the relation of the Court to its subordinate officers who carry out its orders.

It is said that, if the petitioner's contention is correct, O. 38, R. 8, would be unnecessary in the face of O. 21, R. 58, but the same may be said of O. 38, R. 11. It may be some of those rules are not absolutely necessary but have been enacted as a matter of abundant caution.

It may be that, of the various opinions in the decisions, cited by me above and with which I agree, some are *obiter dicta* while others are necessary for the decision. It may be that in some of them the exact period of time when the attachment before Judgment was converted into an attachment in execution had not to be and was not considered.

In the case before us, as soon as the application (E. P. No. 183 of 1916) mentioning an attachment before Judgment and praying for sale, was filed, the Court passed the following order on 6th May, 1916 " Copy of attachment warrant and the order making the said attachment absolute to be produced." These papers were produced on 11th July, 1916. The Court, being satisfied that there was such an attachment as to justify the prayer for sale (as required by O. 21, R. 11), passed the next order on the application on 11th July, 1916. In this order, the Court, apparently acting under O. 21, R. 22, directed notice to the defendant as the decree was more than one year old. This is a definite acceptance by the Court of the application as a proper application for sale and a statement of its willingness to pass further orders on it unless the defendant can show cause. The defendant was served on 29th July 1916. On the 8th August, the Court passed an order directing the sale-papers to be filed. By " sale-papers " were meant drafts of the proclamation, encumbrance certificate, etc., as required by R. 148 of the Civil Rules of Practice. If the papers were filed, the sale would have been ordered ; but, as they were not filed, the application was dismissed. In my opinion, after the Court was satisfied that there was such an attachment on the properties sought to be sold as to satisfy the requirements of O. 21, R. 11, and when it passed the next order on the footing that there was an attachment which serves all the purposes of an attachment in execution, i. e., on 11th July 1916, the attachment before judgment had become converted into one in execution.

F. B

Meyyappa Chettiar v. Chidambaram Chettiar

Ramesam, J.

I will now refer to certain general considerations apart from decisions, which are supposed to be against this view. First it is said that an attachment before judgment is, in its nature, so essentially different from an attachment in execution, that it can be never converted into the latter. This was the view taken in *Sri Rammanik* v. *Tincowri Rai* (9) but, in my opinion, the legislature abandoned it when the section in the Code of 1877 corresponding to O. 38, R. 11, was enacted.

It is true that there are some differences between an order for attachment before judgment and an order for attachment in execution, namely,

(1) The former is made before judgment and the latter after judgment.

(2) An order for attachment before judgment is made only after giving the defendant to show cause why it should not be made. No such notice is given before an order of attachment after judgment. The reason for this difference is the absence of a decree in the former case.

As a corrollary following from this, if security is given by defendant the Court does not pass on order of attachment before judgment ; an attachment already effected will be withdrawn. To the extent that these are considered as very important differences, I do not agree with *Basiram Malo* v. *Kattyayani Debi* (20) which relies on the obsolete decision of 4 B. L. R. 63 (F. B.)

(3) Order 38, R. 12, is another difference due to the anticipating nature of an attachment before judgment.

But do these differences make the attachment before judgment so entirely different in character, from one after judgment that one can never pass into the other ? I am of opinion they do not. In my view, the attachment before judgment and after judgment are identical in their essential features. Each is effected by a prohibitory order. The purpose of both is the same. The consequences of both are the same. All alienations by the judgment-debtors are void against claims enforceable in pursuance of the attachment. Neither has got the character of a charge. It is thus seen that, so far as they vacate or affect rights, they are substantially identical in character (vide 1 N. W. P. H. C. R. at pages 96 and 97 already quoted). Just as the effect of two attachments

9. (1869) 9 Beng L R 63 (F B). 20. (1911) I L R 38 C 448, 450.

of the same property in execution of the same decree (the second one being effected in forgetfulness of the first) is merely that the property is under attachment, the first attachment merging in the second, similarly the effect of an attachment before judgment followed by a redundant re-attachment after judgment is merely that the property is under attachment. In such cases it is meaningless to say that the property is under two attachments. It is still more meaningless to say that one attachment is dropped but another subsists. All the earlier attachments, in all such cases, merge into the last. Where there are several attachments, it is not that every attachment has an individuality of its own but the property is under a state of attachment.

Secondly, it is said that other creditors who obtained no attachments of their own but who might share rateably in the amount that may be realized by the respondent, lose this chance if the respondent's attachment is held to have been extinguished under O. 21, R. 57 and this is a great hardship. I do not see any hardship in this. Such creditors have no rights against the property—none, certainly that ought to prevail against the appellant and if they have a chance of sharing rateably with the respondent under S. 73, it seems to me to be a piece of good luck which they little deserve to have, dependent on the diligence with which the respondent pursued his attachment. They are no more unlucky when the attachment terminates under O. 21, R. 57 than in the case when the decree-holder pays off the attaching creditor or gives some other property as security for the debt of the attaching creditor and the attachment is withdrawn under O. 38, R. 9. The hardship is exactly the same as when we have, instead of the first attachment before judgment, an attachment after judgment. I do not think that instances of creditors sharing rateably in the fruits of the attachment before judgment are more numerous than in cases of attachment after judgment. Finally, I do not think such remote considerations of hardship on other creditors can have any place in the construction of O. 21, R. 57, especially as I am not able to conceive of any argument based on hardship which does not equally apply to attachments after judgment. I am not able to see any reason why the legislature should create a smaller standard of diligence for judgment creditors who had obtained an attachment before judgment, than those who did not, in working out execution of the decree.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar.

Wallace, J.

I would overrule *Venkatasubbiah* v. *Venkata Sashaiya* (1) I agree with Spencer, J., in the order of reference, and answer the question referred to us by saying that the attachment is not subsisting.

Wallace, J.—I agree with the decision of the learned Chief Justice and will, as there is a divergence of opinion in the Full Bench, give my own reasons.

The respondent in this case obtained an attachment before judgment in O. S. No. 153 of 1914 on the file of the Court of the Subordinate Judge, Ramnad, his attachment being obtained on 20th November 1914. He obtained a decree in the Temporary Subordinate Judge's Court, Ramnad, to which his suit had been transferred on 22nd February 1915, which decree was sent for execution to the Court of the Subordinate Judge of Ramnad. He filed an execution petition, 183 of 1916, which was dismissed on 19th September 1916 apparently because he had committed default in failing to file an encumbrance certificate within time. The petitioner before us had, in O. S. No. 108 of 1914, obtained an *ex parte* decree against the same judgment-debtor but that *ex parte* decree was set aside on the judgment-debtor giving security on 15th March 1915, the security being given on the same property which the respondent had attached before judgment. The question for decision is whether, on the dismissal of the respondent's execution petition 183 of 1916, the attachment before judgment ceased or whether that attachment enured and thus takes precedence of the security given on the same property in favour of the petitioner.

Taking O. 38, Civil Procedure Code, as it stands, it seems to me clear from the wording of R. 9 that an attachment before judgment only comes to an end by a formal order of the Court withdrawing it. This is, in my opinion, the correct way of interpreting R. 9, which applies to cases where the security demanded has been furnished, or where the suit has been dismissed. Rule 6 (2) clinches this interpretation. It requires that even in the case of a conditional attachment before judgment, a formal order of withdrawal is necessary to raise the attachment. Much more must it be necessary for raising a final attachment, into which the conditional attachment has been converted. No doubt the rulings in *Ram Chand* v.

1. (1918) I L R 42 M 1.

F. B.

Meyyappa Chettira v. Chidambaram Chettiar

Wallace, J.

Pitam Mal (18) and *Abdul Rahman* v. *Amin Sharif* (19) are contrary to this view, but, for reasons given, I must disagree with them. When the suit has not been dismissed, but decreed, it goes without saying (again taking O.38 as it stands) that the attachment continues, until it is withdrawn by the Court, so long as execution of the decree is not barred. Rule 11 makes that quite clear. See also *Ganu Singh* v. *Jangi Lal* (23).

Respondent obtained a decree in his suit. Hence, so far as O. 38 goes, his attachment before judgment has not come to an end, since there is on record no formal order of withdrawal of the attachment by the Court. It can only have come to an end if there is some other provision of the Civil Procedure Code, which has caused it to cease. Petitioner's contention is that O. 21, R. 57, is such a provision ; and that is really the only argument in his case. The whole point is:—Does the phrase "property .attached in execution" in O. 21, R. 57, include "property attached before judgment," when that attachment is utilised, by force of O. 38, R. 11 for an execution.

Petitioner's contention appears to me open to several objections. In the first place, an attachment before Judgment is not *ejusdem generis* with an ordinary attachment in execution. To effect the former, the Court must, besides issuing, as required by O. 38, R. 7, the usual prohibitory order to the judgment-debtor and the public generally, under Form E-24 of the first schedule, also issue a special order in Form F-7 to its Bailiff to attach the property and keep it "under safe and secure custody until the further order of the Court." This clearly implies that the order under Form F-7 remains in force until it is withdrawn by a further order. It seems to me very difficult to hold that that further order is lying *perdu* in O. 21, R. 57, and must be deemed to have been passed, when the execution application is dismissed under that rule. It is true that form E-24 also uses the same phrase and implies a further order also. On this I can only say that it is inconsistent with R. 57, the inconsistency probably being due to the omission to notice the full effect of R. 57, when it was newly introduced into the Civil Procedure Code of 1908. I find it difficult to hold that in passing this new rule the legislature intended to abolish the "further order of the Court" required by Form F-7, a form not coming under O. 21 at all, or to abrogate the clear

18. (1888) I L R 10 A 506 8 A W N 195.
19. (1918) I L R 45 C 780. 21. I L R 26 C 531.

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Wallace, J.

provisions of O. 38, which had been in force substantially since 1859 at least. Rule 57 of O. 21 is of a penal nature tnd should therefore be construed strictly. One is not entitled to conclude that rights previously enjoyed by parties have been taken away by a new provision in a Code, unless that provision in clear terms or by necessary implication involves such a conclusion.

Secondly, R. 57 appears as a rule in an Order devoted to execution of decrees and orders, and in my view it should therefore be confined to such attachments as are dealt with in the Order itself and not applied to attachments effected outside that Order It has been argued that the phrase "property attached in execution" should mean "property in a state of attachment in the course of the execution of the decree." I think the more natural interpretation is simply that the phrase is to apply to such attachment in execution as is described earlier in the same Order—*vide* O. 21, R. 11, etc. The following R. 58 uses exactly the same phrase. Yet that rule does not apply automatically to property the attachment of which occurred before Judgment. A special rule under O. 38, *viz.*, R. 8, was enacted to make it applicable. There is nothing in R. 8 to indicate that it is confined to claims against an attachment before Judgment, only until the Judgment has ripened through a decree into an execution. The test for the application of R. 8, as I read it, is not "Has execution been taken out," but "at what stage of the case was the property attached." O. 38, R. 8, incorporates, so to speak, R. 58 of O. 21—vide *Prasada Nayudu* v. *Virayya* (22). There is no corresponding rule in O. 38 incorporating O. 21, R. 57, in it, and no rule from which one is entitled to infer that an attachment before Judgment *becomes*, when execution is taken out, on the strength of that, an attachment in execution.

No doubt there is one ruling which loosely uses the word "*becomes*" and to that case our attention was directed in arguments, *viz.*, *Sewdut Roy* v. *Sree Canto Maity* (12). In *Drupati Bibi* v. *Ramrach Pal* (14), the language used is that an attachment before Judgment shall after a Judgment "be deemed to be an attachment in execution of the decree." The fact that the attachment before Judgment is useful chiefly

22. I L R 41 M 849.
12. (1906) I L R 33 C 639.
14. (1909) I L R 31 A 527.

for the purpose of a subsequent sale in execution will not, to my mind, convert every attachment into an attachment in execution.

The petitioner relies strongly uopn the ruling reported in *Arunachalam Chetty* v. *Periasami Servai* (2), which laid down that Art. 11 of the Indian Limitation Act, which deals with the question of the limitation period for an order on a claim petition preferred to "property attached in execution of a decree," applies to an order on a claim petition preferred to property attached before Judgment after an order for sale in execution had been passed. Three points have to be noted with reference to this case; first, that it was a case of a claim made *after* decree, *after* an application for execution had been put in and *after* an order for sale in execution had been passed; secondly, that S. 246 of the old Civil Procedure Code of 1859, which the Judges held to be the *fous et origo* of Art. 11 of the Indian Limitation Act, applied expressly in terms to an attachment before Judgment as well as to an attachment in execution; and thirdly, that they were oppressed by the facts that, despite the provisions of the old Code, the legislature had provided no special period of limitation at all for claims to property attached before Judgment, and that, unless "the whole object of the summary claim procedure" was to be "frustrated," a briefer period of limitation than that in Art. 120 had to be found somewhere. The learned Chief Justice and the other learned Judges, who adopted his Judgment in that case, considered that they "should not be justified in laying down generally that property attached before Judgment is attached in execution of a decree" and they distinctly held that O. 21, R. 57, threw no light on the point that had been then argued before them. I do not think this ruling goes further than to say that a claim put in after there is an order in execution for sale following upon on attachment before Judgment "may properly be regarded as a claim to property attached in execution of a decree within the meaning of Art. 11" of the Limitation Act. It cannot, therefore, be construed to lay down that in all instances where the phrase "property attached in execution" occurs in any statute, it covers cases of property attached before judgment as soon as execution is taken out on the decree arising out of that judgment; it must, in my opinion in view of the compulsion, if it may be so called, exercised over

2. (1921) I L R 44 M 902 : 41 M L J 256 (F B).

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Wallace, J.

their Lordships' minds, by the omissions of the Legislature, be strictly confined to what it lays down. I cannot, therefore, read into it a reversal of the decision in *Venkatasubbiah* v. *Venkata Seshaiya* (1). That is a direct authority in favour of the respondent in this case, to which one of the learned Judges in the I. L. R., 44 Madras case was a party, and other direct authorities quoted therein are *Gones Chandra Adak* v. *Banwari Lal Roy* (5) and *Bavuddin Sahib* v. *Arunachala Mudali,* (6) and another case, which indirectly is in favour of the respondent, *Kosuri Surāparaju* v. *Mandapaka Narasimham,* reported in 26 I. C., 81.

General considerations of equity, such as, for example third parties relying, for purposes of rateable distruction, on an attachment before judgment by some one else are entitled to be in any better position than third parties relying on some one else's attachment after judgment, or whether a party defaulting in the prosecution of his execution application ought to be in a better position because he has atttched before judgment than if he had attached after judgment, do not, I feel, assist me much in the decision of this case. I think the decision must be based on an interpretation of the express provisions of the Code and on a consideration of the rights conferred by prior Civil Procedure Codes before O. 21, R. 57, was passed at all. These last were perfectly clear and included the anomalies just mentioned, and the new Civil Procedure Code has left them as they were before.

I would, therefore, in answer to the reference, say that O. 21, R. 57, does not apply to cases where the attachment is an attachment before judgment.

Waller, J.

Waller, J.—I think that the question referred to us should be answered in the negative. O. 38, R. 11, provides that, where there has been an attachment before judgment, a decree-holder, in order to execute the decree, must make an application for execution, but need not re-attach. This is the only privilege he is given and I do not consider that it was intended to carry with it exemption from the penalty that awaits negligence on the part of attaching decree-holders in general. After he has made his application, he becomes subject to the provisions of O. 21. I agree that O. 38 contains the whole

1. (1918) I L R 42 M 1.
5. (1912) 16 C L J 86.
6. (1913) 26 M L J 235.

F. B.
Meyyappa Chettiar v. Chidambaram Chettiar
Waller, J.

law in regard to attachment before judgment as such, but am not prepared to concede that attachment before judgment and attachment in execution are two entirely separate and distinct processes.

There is authority on both sides. In *Venkatasubbiah* v. *Venkata Seshaiya* (1) it was held that O. 21, R. 57, had no application to attachments before judgment. The Judges followed one Calcutta and two Madras decisions on the point The Calcutta case [*Gones Chandra Adak* v. *Banwari Lal Roy* (5) is certainly a direct authority in support of their view. One of the Madras cases (*Bavuddin Sahib* v. *Arunachala Mudali* (6) is—i fanything—an authority for the opposite view. What it actually decided was that an attachment before judgment did not cease to exist because an application for the arrest of the judgment-debtor had been dismissed for default. That is not in point here. Incidentally, however, the opinion was expressed that an attachment before judgment was converted into an attachment in execution where the decree-holder applied in execution for sale of the attached property. At the same time, a doubt was raised, with reference to the Calcutta decision, whether the opinion was correct, a doubt which the Judges expressly refrained from solving. The last case *Kosuri Suraparaju* v. *Mandapaka Narasimham* (7) is not very clear. Apparently an execution application had been dismissed. If it was dismissed for default, the decision is a direct authority in support of *Venkatasubbiah* v. *Venkata Seshaiya* (1). On the other side—apart from dicta in certain cases—there is *Arunachalam Chetty* v. *Periasami Servai* In that case property had been attached before judgment, a decree had been passed and an order for sale had been granted in execution. The question the Court had to decide was whether the words "property attached in execution of a decree" in Article 11 of the Limitation Act covered an attachment before judgment. The Full Bench decided that they did. The main judgment was delivered by Wallis, C. J., with whom all the other Judges concurred. Spencer, J., delivered a separate judgment which—as I understand it—went no further than that of the Chief Justice. It must be conceded that the particular instance with which the Court was concerned was one in which sale had actually been ordered ; but I cannot agree that

1. (1918) I L R 42 M 1.
5. (1912) 16 C L J 86.
6. (1913) 26 M L J 215.
7. (1914) 1 L W 932.
2. (1921) I L R 44 M 902 41 M L J 256 (F B).

F. B.

Meyyappa Chettiar v. Chidambaram Chettiar

Waller, J.

that fact affects the principle of the decision. An order for sale pre-supposes and is based on an existing attachment. It does not itself create the attachment. If therefore an attachment before judgment becomes at any stage an attachment in execution, it must, in my view, be at the stage where an application to execute has been made and admitted under O. 21, R. 17. And that I conceive to be the principle laid down by the Full Bench. I may add that, in the present case, sale papers had been called for which is usually done after attachment has been ordered. I am unable to see how a subsequent order for sale would have altered the position. Wallis, C. J. explicitly stated that he was considering both cases, that is, those " in which the claim is put in after decree or even, as in the present instance, after sale had been ordered in execution." Further on he observed : " This provision (Order 38, R. 11) does not, in my opinion, enable us to say that property attached before judgment becomes property attached in execution of a decree upon the mere passing of a decree either within the meaning of Article 11 of the Limitation Act or of O. 21, R. 57, *as execution may never be applied for."* This sentence seems to me to indicate (*a*) that he was considering the meaning of the phrase under discussion both in Art. 11 of the Limitation Act and in O. 21, R. 57 (*b*) that he was of opinion nothing more was necessary to convert an attachment before judgment into an attachment in execution than an application to execute. The order for sale he regarded as " proceeding on the footing that the property had to be considered as having been attached in execution by virtue of R. 11." The reference to R. 11 requires an application to execute (and such an application would, b ut for the proviso in the rule itself, be for attachment as well as sale) is to my mind conclusive proof that he considered that the attachment changed its character from the time of the application to execute. And that was the view taken by Spencer, J. Wallis, C. J., no doubt remarked that O. 21, R. 57, threw no light o nthe question he was considering. Nor did it. He was considering the meaning of a certain expression in Art 11 of the Limitation Act which was practically identical in terms with a phrase in O. 21, R. 57, but found that the context in which the latter stood gave him no assistance in interpreting the former.

As I have already pointed out, the quotation above with its reference to " within the meaning of O. 21, R. 57 " shows that

(F. B.)

Meyyappa Chettiar v. Chidambartam Chetiar

Waller, J.

he was considering that rule as well as Article 11. I see no reason to doubt that he and the other Judges would have been prepared, had it been necessary, to answer the question referred to us in the negative. Indeed, I do not see how an answer can be avoided. When once it has been found that, for one purpose an application to execute converts an attachment before judgment into an attachment in execution, the conclusion is, to my mind, inevitable that the conversion operates for all purposes. Following what I believe to be the principle laid down by the Full Bench, I hold that, in this case, the property had been attached in execution within the meaning of R. 57 and that the attachment ceased when the application for execution had been dismissed for default.

I may add that the same question has since been argued before me with reference to S. 9 of the Presidency Towns Insolvency Act. Under that section, an act of insolvency is committed where any part of a man's property has been attached in execution of a decree for over 21 days. It would, in my opinion, be anomalous to hold that an attachment before judgment takes a judgment-debtor out of the section, even though execution has been proceeding against his property for more than the prescribed period.

The Court.—By a majority the question will be answered in the negative.

C. A. S. *Reference answered in the negative.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Appasami Mudali and others *Petitioners (Accused).*

Appasami Mudali. *In re.*

Criminal Procedure Code Ss. 54 and 55 (c)—Penal Code S. 225 B—Arrest by police constable without warrant—Resistence —Offence.

Where a police constable arrests a person and tells him expressly that he is doing so under a particular authority which he claims to have to arrest him, and such arrest is resisted, it will be for the prosecution on a charge under S. 225 B I. P. C., to establish that the constable who arrested the person had power to act under the authority he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority to arrest under some other provision of law.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the judgment of the Court of the Joint Magistrate, Hosur, in Criminal Appeal No. 13 of 1923 preferred against the judgment of the Court of the Sub Magistrate of Denkanikota in C. C. No. 142 of 1922.

Appasami Mudali *In re.*

V. L. Ethiraj Counsel for the petitioners.

The Public Prosecutor on behalf of the Crown.

The Court made the following

ORDER :—In this case the three petitioners before me have been convicted under S. 225-B of the Indian Penal Code and sentenced to various fines by the Sub-Magistrate of Den-Kanikota, and their conviction has been confirmed by the joint Magistrate of Hosur.

The prosecution case is that certain constables were sent to the village of Ullugurukki on the 29th May 1922 and P. W. 1, a constable, arrested the first accused and took him by his hand. Then, it is said, the accused asked him why he arrested him and that the constable told him that he was arresting him under S. 54 of the Criminal Procedure Code. The accused seems to have resisted this arrest on the ground that he was not liable to be arrested under S. 54 Cr. P. Code. The constable who arrested him has no warrant for this arrest. Accused 2 and 3, who are the sons of the first accused, also seem to have taken part in resisting the arrest. All the same, all the three accused were arrested by the constables and taken to the police Station. The charge under S. 225-B is on the ground that the father tried to escape from custody after he was arrested and that the sons helped him to do so. S. 225-B requires that the custody from which a man tries to escape must be a lawful custody he must have been lawfully arrested and detained then only he is liable to conviction under S. 225-B. It is not denied in this case that the constable had no power to arrest the first accused under S. 54 Cr. P. Code. When the prosecution found its weakness after the case was almost nearly over in the Lower Court they changed the case and contended that the 1st accused was arrested under S. 55 (c) and that the arrest was legal.

The question that arises before me is whether, when a constable goes and arrests a man and tells him under what authority he is arresting him, when that authority is not a lawful authority, can the man arrested be convicted and punished under S. 225-B for resisting such arrest although the constable might have authority to arrest him under some provision of law. For the purpose of deciding the point, I will assume that, if the arrest had been under S. 55 (*c*) it would have been a lawful

*Cr. R. C. No. 715 of 1923.
(Cr. R. P. No. 573 of 1923.) 7th February 1924.

arrest. That is a question which I shall consider presently. I have come to the conclusion that when a constable arrests a man and tells him expressly that he is doing so under a particular authority which he claims to have to arrest him, and if such arrest is resisted, it will be for the prosecution afterwards to establish that the constable who arrested the man had power to act under the authority that he claimed to have. It is not sufficient for the prosecution afterwards to say that the constable had authority under some other provision of law. I think any man who is being arrested, has a right to ask the Officer arresting him to show him what power he has to do so. If the arrest is under a warrant it has been held that the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested and that, when the warrant is not shown to him and the arrest is made, such an arrest will not be a legal arrest. A man is entitled to know when a constable is arresting him, under what power he is acting and if he (the constable) states that he acts under a certain power which the man knows he has not got, I am not prepared to say that he is not entitled to object to such arrest and to escape from custody when he is arrested. So far as S. 54 is concerned, no attempt has been made before me to justify the arrest, and it seems to me that on that ground this petition ought to succeed.

Apart from it, even, under S. 55 (*c*) I am not satisfied that the prosecution has proved that the constable had authority to arrest the man. That clause says, " Any person who is by repute an habitual offender, house-breaker or thief or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or, in order to the committing of extortion, habitually puts or attempts to put persons in fear of injury," may be arrested by an Officer in charge of a Police Station. There is nothing before me to show that there was any ground for taking action under S. 55 (*c*) by the Police in this case. The Officer who ordered his arrest and gave evidence as C. W. 1, only says that he had reason to suspect that the first accused was concerned in several offences. He does not say anything about his being reputed to be a habitual robber, or house-breaker ; at the time he gave evidence the prosecution case was that the arrest was made under S. 54 and not under S. 55 (*c*) ; so that his evidence does not relate to a case under S. 55 (*c*) at all.

Appasami Mudali *In re.*

In these circumstances it seems to me that the arrest of the first accused cannot be considered to have been a lawful arrest and his attempt to escape from custody would not fall under S. 225-B I. P. C. He must therefore be acquitted, and as a result of his acquittal, accused 2 and 3 must also be acquitted.

The fines, if paid, will be refunded to them.

A. V. V. *Petition allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

Sendattikalai Pandia Chinna Thambiar Avergal *Petitioner in all** (*Appellant*)

v.

Veerappa Naidu and others *Respondents.*

Sendattikalai Pandia Chinna Thambiar *v.* Veerappa Naidu

Court Fees Act, S. 7 (1) (V) (*c*) *and Sch.* II, *Art.* 17 (III *and* VI)——*Suit for commutation of grain rent into money rent——Appeal Valuation——Court-fee payable—Revision—Interference by High Court—C. P. Code S.* 115.

An appeal by a landlord from the decree in a suit for commutation of grain rents into money rents, on the ground that the rate fixed by the lower Court was too low, falls either under Sch. II Art. 17 cl. (III) or Sch. 11 Art. 17 cl. (VI) of the Court Rees Act and must bear court-fees accordingly. Neither S. 7 cl. (1) nor cl. (IV) (*c*) of the Act has any application to the case.

Quaere— Whether the High Court should interfere in revision with an order of the lower court deciding the proper amount of Court-Fee payable in a case pending in that Court.

Chandramani Koer v. *Basdeo Narain Singh* 4 Pat L. J. 57; *Mussammat Lachmibate Kumari* v. *Nana Kumar Singh* 5 Pat. L. J. 400 ; *Lakshmiamma* v. *Janani Jayan Nambiyar* 4 M L J 183 ; *Muthu Pillai* v. *Muthu Pillai* (1922) M. W. N. 831 Referred to.

Petitions under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Tinnevelly in A. S. Nos. 312 to 316, 318 to 334, 336 to 342, 344 to 359 and 362 of 1920 and 142 to 146 and 148 to 150 of 1921 respectively.

A. Krishnaswami Aiyar and *A. S. Visvanatha Aiyar* for appellants.

The Government Pleader (*C. V. Ananthakrishna Iyer*) for respondents.

The Judgment of the Court was delivered by

Phillips, J. :—All these petitions relate to suits filed by tenants against the landlord for commutation of grain rents into money rents. The Deputy Collector allowed this commutation and fixed the rate at which it was to be made. The

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*C. R. P. Nos. 45 to 49, 51 to 67 69 to 75, 77 to 92, 95 to 100 and 102 to 104 of 1923. 29th January 1924.

Sendattikalai Pandia Chinna Thambiar v. Veerappa Naidu

landlord appealed to the District Judge on the ground that the rate fixed was too low and he calculated the value of the relief sought at the difference between the amount fixed by the Deputy Collector and the amount which he alleged to be correct and paid *ad valorem* fees on the amount. The District Judge has held that this is not correct but that a fee of Rs. 10 should be paid on each appeal under Sch. II of the Court Fees Act, cl. 17 (6) holding that it is a suit where it is not possible to estimate the money value of the subject-matter in dispute and which is not otherwise provided for by this Act. Now the petitioner applies to have the order of the District Judge set aside.

A preliminary objection is taken by the learned Government Pleader that no revision can be had in a case of this sort, and he relies on two reported cases from the Patna High Court, *Chandramani Koer* v. *Basdeo Narain Singh* (1) and *Mussammat Lachmibate Kumari* v. *Nana Kumar Singh* (2). It has, however, been held in *Lachmi Amma* v. *Janani Jayan Nambiyar* (3) that an order under S. 12 of the Court Fees Act is only final as regards the valuation of the suit and not when it relates to the category into which that suit falls and in consequence of this it has been held in two cases in this Court that a revision petition will lie—*Muthu Pillai v. Muthu Pillai* (4) and *Dodda Sannkappa* v. *Sakravva* (5). These are decisions of single Judges, but in other cases also revision has been granted without any discussion of the question of whether it is proper to do so. There is a definite conflict of opinion and we do not feel called upon now to decide the point in view of our decision on the merits.

This suit is in effect a suit for a declaration that the grain rent shall be commuted into money rent at a certain rate and the appeal is to the same effect, namely, that the commutation shall be at a certain rate higher than that fixed by the first Court. It is argued first of all that the case comes under the Court Fees Act, S. 7 (*i*), which relates to suits for money, but in this case there is no claim for money and certainly the landlord is not entitled to a decree for any amount whatever in this suit.

It is then suggested that S. 7, cl. (*iv*) (*c*) is applicable, that is, a suit to obtain a declaratory decree or order, where consequential relief is prayed. Here there is no consequential

1. (1918) 4 Pat L J 57.
2. (1920) 5 Pat L J 400.
3. (1893) 4 M L J 183.
4. (1922) M W N 831.
5. (1916) 36 I C 831.

Sendattikalai Pandia Chinna Thambiar v. Veerappa Naidu

relief. It might be argued that in the Original Suit the prayer to enter the amount of rent in the pattah was a consequential relief but that is very doubtful, for the mere fact that the rent is determined *ipso facto* carried with it the necessity to enter it in the pattah that is issued, and there is no need for a prayer for the grant of pattah. At any rate, in appeal that question is not raised at all and no consequential relief is asked for.

S. 7 (*iv*) (*e*) is also suggested as governing this case, *e.*, a suit " for a right to some benefit (not herein otherwise provided for) to arise out of land. " In the margin we find the words " for easements " and it is quite clear that it must be some such benefit that is contemplated by this section ; it cannot mean pecuniary benefit, because pecuniary benefits are otherwise provided for under other clauses.

Finally the argument is put forward that S. 7 (*xi*) (*b*), namely, to enhance the rent of a tenant having right of occupancy, must be applied. The prior rent in this case was a grain rent. The new rent asked for is a money rent, and it is not suggested that the money rent is any greater than the grain rent, but what is asked for is money rent equivalent to the prior grain rent and in that view it certainly is not a prayer to enhance the prior rent. It is merely a prayer to increase the rate fixed by the lower Court which has never actually been the rent levied prior to suit nor prior to the appeal.

These clauses all being inapplicable, we are left with Sch. II, Art. 17 (*iii*), suits for declaration, or Art. 17 (*vi*), the provision which has been applied by the District Judge. In both these cases, the fee payable is the same and, whether it comes under one or the other, the fee ordered to be paid by the District Judge is the correct fee.

The petitions are therefore, dismissed. There will be no order as to costs. Time for the payment of the proper fee will be extended by one month from this date.

A. V. V. *Petition dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

ORDINARY ORIGINAL CIVIL JURISDICTION.

PRESENT :—MR. JUSTICE KUMARASWAMI SASTRI.

M. Sabapathy Chetty *Plaintiff**

v.

A. Shanmugappa Chetty and others *Defendants.*

Sabapathy Chetty v. Shanmugappa Chetty

Limitation Act Art. 183—*Execution of decree—Limitation—Payment by Court —Effect of —Saving of limitation.*

Properties belonging to the judgment-debtor were sold and the proceeds brought into Court. The Court ordered payment there out to the decree-holder but the money was actually paid only some time later. *Held* that the payment by Court operated to give a fresh starting point of limitation for execution of the decree under Art. 183 of the Limitation Act.

Thangaishettithi v. *Duja Shetti* 35 M L J 575.

Govinda Pillai v. *Dasai Goundan* 41 M L J 423 Relied on.

M. *Sundaram Aiyar* for plaintiff.

The Court delivered the following

JUDGMENT :—This is an application to execute the decree in C. S. No. 188 of 1903 by the transferee-plaintiff, and the only question is whether the application is barred by limitation. The decree is dated 14th December, 1904. An appeal was filed against that decree which was also dismissed on 27th February, 1906. On the 9th May, 1908, execution was applied for and sale was ordered on 21st July, 1908. The property was sold on 1st May, 1909. The 1st defendant applied to set aside the sale and that application was dismissed on 29th September, 1909. An order was passed on the 6th October, 1909 giving leave to execute the decree as regards the balance. The plaintiff decree-holder died shortly afterwards and his estate vested in the Administrator-General of Madras. He applied for payment out of the net sale proceeds and an order was passed on 9th January, 1912 ordering payment to be made. The present application was filed on 1st February, 1923.

The order of the 6th October, 1909 as regards payment runs as follows "That the Registrar of this Court do from and out of the sum of Rs 26,250 standing in his hands to the credit of this suit pay to Messrs Madras Sales and Agency Co., the auctioneers herein the sum of Rs 289-14-6 as and for their commission as auctioneers and expenses of sale ; and he do pay to the plaintiff herein the sum of Rs. 24,710-1-6." The plaintiff died without receiving this money. An application was

*C. S. No. 188 of 1903 30—8—1923

Sabapathy Chetty v. Shanmugappa Chetty

made by the Administrator-General of Madras, who was appointed administrator *pendente lite* in respect of the Testamentary Suit No. 1 of 1910 relating to the estate of the plaintiff, for the payment of the sum of Rs. 25,932-7-6 and an order was made on the 9th January 1912 directing the Registrar to pay this sum to the Administrator-General. The question is whether this order of the 9th January 1912 saves the period of limitation.

The article applicable to cases of this kind is Art. 183 of the Limitation Act. It provides a period of 12 years to enforce a judgment, decree or order of any Court established by Royal Charter in the exercise of its ordinary original civil jurisdiction the period to run from the date when a present right to enforce the judgment, decree or order accrue to some person capable of releasing the right. The proviso however provides that the period of twelve years should be computed from the date of payment or acknowledgment in cases where some part of the principal money secured thereby or some interest on such money has been paid, or some acknowledgment of the right thereto has been given in writing signed by the person liable to pay such principal or interest, or his agent, to the person entitled thereto or his agent." Article 182 of the Limitation Act refers to execution of decrees or orders of any Civil Court not provided for by Art. 183. The period in three years and varying periods are given in the third column as the date from which the period is to run. The first question is whether when a payment has been ordered by a Court that Court can be said to be acting as the agent of the judgment-debtor. This question has been decided in *Thangishettithi* v. *Duja Shetti* (1) and *Govinda Pillai* v. *Dasai Goundan* (2). The ground of the decision is thus put by Coutts Trotter, J., in his judgment, " If a debtor's assets are so placed either by his own act or by operation of law that if some one other than he alone can realise them for the purpose of making payment due from him, then the act of that other in operating upon the debtor's assets must be treated as the act of the debtor himself, the violation of the debtor in such a case being neither requisite nor relevant. If that be so, it appears to me that the words ' his agent duly authorised in that behalf ' in S. 20 of the Limitation Act are satisfied by the act of the Judge of the Court which authorises the payment ; and that his handwriting is rightly described as that of the person making the payment."

1. (1918) 35 M L J 575. 2. 41 M L J 423.

Sabapathy Chetty v. Shanmugappa Chetty

The payment ordered can therefore save limitation as the payment made by an authorised agent of the defendant. Art. 183 also refers to the actual fact of payment and not to any order directing payment.

The main contention of the defendant is that as the order of 6th October, 1909 directs payment to the decree-holder of this identical sum he could have obtained payment at once and the fact that he delayed to obtain payment could not operate to extend the period of limitation, that he should have executed the order of 6th October 1909 and that as that was the only order which could be enforced period began to run from the date of that order and not from the date of subsequent payment made in pursuance of it. There is a great deal of force in the contention that a person cannot by his own volition defer receiving payment and thus keep the decree alive for his benefit. But what I have to see is the actual language of the article and not any sequence that may arise on the application of that language. Art., 183 applies only to payment and where the Court orders payment and the authorities are that the Court so acting is the agent of the defendant the requisites of Art., 183 are satisfied. As regards 182 the cases in *Venkatroyalu* v. *Narasimha* (3), *Kerala Varma Valiya Rajah* v. *Shangaram* (4), *Koomayya* v. *Krishnanna Naidu* (5) *Bapu Chand* v. *Mogat Rao* (6) and *Thangi Shettithi* v. *Duja Setti* (1) take the view that payment out of a sum from Court is a step in aid of execution under Art. 182 cl. 5. But *Hem Chander Choudhry* v. *Brojo Sundree Debee* (7), *Fazal Imam* v. *Metta Singh* (8) and other cases take a contrary view. If the payment out of Court irrespective of the date of order on which payment is ordered is a step in aid of execution, I think that it can be held with equal force that the actual payment under Art. 183 would be the starting point of limitation. I confess there is a great deal to be said in favour of the Calcutta view; but I am bound by the Madras decisions. I am therefore of opinion on the authorities of the Madras High Court that this application is not barred by limitation. I stay execution for one month to enable the defendant if so advised to appeal and get stay of execution.

A. V. V.

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3. (1880) I L R 2 M 174.
4. (1892) I L R 16 M 452.
5. (1893) I L R 17 M 165 : 3 M L T 96.
6. (1896) I L R 22 B 340.
1. (1918) 35 M L J 575.
7. (1881) I L R 8 C 89.
8. (1884) I L R 10 C 549.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE ODGERS AND MR. JUSTICE WALLACE.

Tadi Somu Naidu and another *Accused 1 and 3 in C. C. No. 3 of 1922 on the file of the 1st class Magistrate, Yellamanchilli. (C. A No. 23 of 1922 Sessions Court, Vizagapatam.)*

Somu Naidu *In re*

Criminal Procedure Code Ss. 369 *and* 439 (2)—*Criminal case—Power of High Court to review its own decision—Criminal revision—Order enhancing sentence without notice to accused—Legality of—Re-hearing of the case.*

Where the High Court acting under S. 439 Cr. P. Code enhances the sentence passed by the lower Court on the accused without giving him a reasonable opportunity to be heard, the High Court acts without jurisdiction and its order is void *ab initio*. It is therefore open to the High Court notwithstanding the prior order, to decide the case on its merits after giving proper notice to the accused. Where there is jurisdiction, the judgment of the High Court in a criminal case is final as soon as it is signed and thereafter there is no power in the Court to review or alter that decision.

In re Kunhammad Haji 46 M. 382; *In re Ranga Rao* 23 M. L. J. 371; *Rajjab Ali* v. *Emperor* 46 C. 60; *In re Gibbons* 14 C. 42; *Empress* v. *Durgacharan* 7 A 672 Referred to.

This case came on for hearing on Wednesday the 5th day of December 1923, in pursuance of the order of the High Court, dated 25—10—1923 and made in Cr. M. P. No. 529 of 1923, upon perusing the record submitted in accordance with the proceedings of this Court, dated 26—10—1923 and the orders of the High Court dated 27—9—1923, and 25—10—1923 and made in Cr. R. C. No. 208 of 1923 and Crl. M. P. No. 529 of 1923.

Public Prosecutor on behalf of the Crown.

V. L. Ethiraj and *T. S. Anantarama Aiyar* for accused.

The Court made the following

Odgers, J.

ORDER :—*Odgers, J.*—In this case accused 1 and 3 were convicted by the 1st class Magistrate of Yellamanchilli of forgery for the purpose of cheating (S. 468 Indian Penal Code), and sentenced to imprisonment till the rising of the Court—also 1st accused was ordered to pay a fine of Rs. 300 with 3 months' rigorous imprisonment in default, and 3rd accused was fined Rs. 150 with two months' rigorous imprisonment in default. On appeal, the Sessions Judge of Vizagapatam confirmed the conviction and sentences. The case was taken up

*Cr. R. C. No. 208 of 1923
(Taken up No. 9 of 1923) 17th December 1923.

Somu Naidu *In re*

Odgers, J

in revision by Devadoss, J., on the ground that the Magistrate had no jurisdiction to try the case. The case came on for hearing on 27—9—1923 before Krishnan, J., who held that the conviction was correct but enhanced the sentences on each accused to six months' rigorous imprisonment retaining the sentence of fine. Mr. T. S. Anantaraman, Vakil for 1st accused, stated he had no instructions and 1st accused did not appear in person. 3rd accused appeared neither in person nor by pleader. On 25—10—1923 Krishnan, J., vacated his previous order, no doubt, because he found it had been passed without jurisdiction, and directed the case to be posted later, on the question of enhancement. The case, therefore, came on before Waller, J., on 8—11—1923, who referred it to a bench as the Public Prosecutor proposed to argue that Krishnan, J., had no power to vacate his order, and the question has accordingly been argued before us on that point, and also on S. 439, Criminal Procedure Code. It is clear that under S. 369, Criminal Procedure Code, the judgment of this Court in a Criminal matter as soon as it is signed, is final and the Court is *functus officio* as soon as that is done. Thereafter there is no power to revise or alter that decision. *In the matter of Gibbons* (1) and *Queen Empress* v. *C. P. Fox* (2) and *Ranga Rao* v. *Emperor* (3) where it was held that the High Court has no power to review an order made in the exercise of its revisional jurisdiction. The old section ran as follows.

' No Court, other than a High Court, when it has signed its judgment, shall alter or review the same, except as provided in Ss. 395 and 484 or to correct a clerical error.' Petheram, C. J., in I. L. R. 14 Cal. 42 at page 47, said "In as much as it is not shown to us that, before the passing of this section, any power of revision existed in the High Court, that section did not, in my opinion, create any such power."

The new section runs as follows :—

' Save as otherwise provided by this Code or by any other law for the time being in force or, in the case of a High Court established by Royal Charter, by the Letters Patent of such High Court, no Court when it has signed its Judgment, shall alter or review the same, except to correct a clerical error.'

It has not been argued that the amendment has changed the scope or effect of the section, and it is not shown that any such power is reserved to this High Court by its Letters Patent.

1. I L R 14 C 42 (F B) 2. I L R 10 B 176 (F B)
3. (1912) 23 M L J 371.

Somu Naidu *In re*

Odgers, J.

In *Rajjab Ali* v. *Emperor* (4), in which the Full Bench in *In the matter of Gibbons* (1) was followed, there occurs the remark : (at p. 63)

"The result of the decisions of this Court subsequent to the Full Bench case seems to be this : that where a case is disposed of merely for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertance no opportunity has been given to him to be heard in his defence such an order is not one to which the ruling in the Full Bench case applies." In *In re Kunhamad Haji* (5), it was held that neither S. 364 nor S. 439 of the Code of Criminal Procedure empowers the High Court to revise or review the Judgment of one or more of its Judges in a criminal appeal or revision. The learned Judges (Oldfield and Devadoss, JJ.) in a very careful Judgment examined all the case-law on the point and held as above set out. It appears to me, therefore, that Krishnan, J., had no power to revise his order of 27—9—1923 and that his order of 25—10—1923 must be treated as a nullity.

We have therefore to consider the next question under S. 439. Mr. Ethiraj for the accused contends that the order of enhancement of 27—9—1923 was passed without jurisdiction as his clients had no opportunity of being heard as required by sub-S. (2) of S. 439. The question is whether we have power to come to any conclusion with regard to the order of enhancement or whether we should there be falling into the very error, I have just pointed out as we have no power to revise the same. As pointed out, the accused did not appear. Mr. Anantaraman for 1st accused asked for an adjournment which was refused. He thereupon reported no instructions, as he was only retained on the question taken up by Devadoss, J. It does not appear from the order of Krishnan, J., of 25—10—1923, that the learned Judge purported to vacate his order on this ground, that is, the non-appearance of the accused. But we are informed that that was so and there is no reason to doubt that this consideration induced the learned Judge to make the order of 25—10—1923. The question is not as to our power to revise the order of Krishnan, J., but whether we have power to take any action as to the order of enhancement ; if Krishnan, J. 's order is one he had power to make, we cannot do so ; if on the other hand it is an order he had no power to make by reason of the language of S. 439 (2),

4. I L R 46 C 60. 1. I L R 14 C 42 (F B).

5. (1923) I L R 46 M 382 : 44 M L J 450.

Somu Naidu
In re
—
Odgers, J

Cr. P. Code, then it seems to me that we are authorised to deal with the question. We are not revising Krishnan, J.'s Judgment but considering our own powers of acting on the petition before us. The language of the sub-section is mandatory and is clearly enacted as an exception to S. 440. It appears to me therefore that if the accused had no opportunity of being heard, this being clearly an order to his prejudice, more than an irregularity occurred, and that there is authority for holding that an order so passed was passed without jurisdiction. The facts appear as follows :—

On 14—9—1923 the accused received notice to show cause against enhancement on 17—9—1923. The case did not come on, on that day, but on 27—9—1923. On 28—9—1923, accused received a second notice dated 20—9—1923 fixing 8—10—1923 for the hearing of the case. A day or two after 28—9—1923 the accuseds' Vakil at Vizagapatam received a letter from Mr. T. S. Anantarama Aiyar informing him that the case had been disposed of on 27—9—1923. The office posted the case apparently as soon as a return to the first notice was made, but while the second notice was outstanding. I have no hesitation in saying that the accused must have been embarrassed by this procedure and I hold that they had no reasonable opportunity under these circumstances of being heard. The authority for the proposition that an order passed in such circumstances is without jurisdiction is to be found in the passage from *Rajjab Ali* v. *Emperor* (4), already quoted. Further, the learned Judges in *Rangha Rao* v. *Emperor* (3), say, following 7 M. H. C. R., Appendix 29, that where a criminal appeal has been rejected, and accused's pleader had not a reasonable opportunity of being heard, the Court could restore a case to its file. They continue "We have no doubt that this is correct, for the language of S. 421 required a reasonable opportunity to be given and if such reasonable opportunity is not given, the Court has no jurisdiction to dismiss the appeal." In *In re Kunhammad Haji* (5), Oldfield, J., assumes that reasonable notice under S. 420 is a condition precedent to the exercise of the Court's jurisdiction, and that that condition not being fulfilled, there was no previous valid adjudication to bar a hearing on the merits,—which is exactly the case here. Devadoss, J.; in the same case doubts the validity of *Ranga Rao* v. *Emperor* (3), on the ground that the Court is not entitled to dismiss

4. I L R 46 C 60 3. (1912) 23 M L J 371.
5. I L R 46 M 382 : 44 M L J 450.

Somu Naidu *In re*

Odgers, J

a criminal revision petition for default but should dispose of it on the merits. The High Court in that case dismissed the petition to restore a criminal revision petition dismissed for default. Neither of the learned Judges in *In re Kunhammad Haji* (5) says that the passage quoted above from *Ranga Rao* v. *Emperor* (3) is a mis-statement of the law. I must therefore hold that there is no bar to this matter of enhancement being heard on the merits. I would, however, add one thing. The learned Public Prosecutor has pressed upon us that if we come to this conclusion, it will open a wide door to revision in criminal matters and that it may be applied to any manner of error. I think there is no such danger. This case is exceptional in its circumstances, and has been brought about by the practice of the office in posting a case in the list in accordance with one notice, while there is another and subsequent notice for a different date outstanding. As stated above, we are in no way reviewing or revising any order of Krishnan, J., but simply deciding that there was no previous valid adjudication to bar a hearing on the merits. There must be fresh notice to the accused and the case will come up afresh for disposal on the question of enhancement of sentences.

Wallace, J.

Wallace, J. :—The question before us, as I conceive it, is whether this criminal revision case taken up *suo motu* by this Court calling on the accused to show cause against enhancement of punishment has already been disposed of finally by this Court by the order of Krishnan, J., dated 27—9—1923, or whether it is *res integra*. It is not a question of whether the present Bench can sit in revision over either of the orders of Krishnan, J., but whether either or both of these orders is *ab initio* null and void as being made without jurisdiction, and for the purpose of deciding that question, and for no other purpose, it is necessary for us here to consider the legal effect, if any, of these two orders.

To take the first order of 27—9—1923, it was admittedly passed without hearing the accused, and I think we must take it that the accused had had no reasonable opportunity of being heard since Krishnan, J., thought it necessary later on in the interests of justice by means of a second order dated 25—10—1923 to vacate his order imposing enhanced punishment. It appears that the accused were served with a notice of the revision case first on 14—9—1923 in the Vizagapatam

5. I L R 46 M 382. 3. (1912) 23 M L J 371.

Somu Naidu
In re
—
Wallace, J.

District for a hearing at Madras on 17—9—1923, and that a fresh notice was sent to them fixing 8—10—1923 for hearing which was served on them there again on 28—9—1923, and that in the meantime the case was posted for hearing in this Court on 27—9—1923 and heard. A pleader, who had appeared for them earlier in the case before the question of enhancing the punishment was taken up *suo motu*, appeared on 27—9—1923 on seeing the case posted on the notice board. He was not instructed to argue the question of enhanced punishment on behalf of the accused and he therefore only prayed for an adjournment which was refused In these circumstances I think it clear that the provision in S. 439 (2) of the Criminal Procedure Code that "no order under this section shall be made to the prejudice of the accused unless he had an opportunity of being heard either personally or by pleader in his own defence" had not been followed in this case.

The next point is whether such failure *ipso facto* rendered the order passed on 27—9—1923 null and void. We have been referred by the accused's counsel to several rulings. In *Shanmugam Chettiar* v. *Alagia Nambiya Pillai* (6), this High Court set aside an order of a lower appellate Court disposing of an appeal on the date previous to the date fixed for hearing on the ground that such a proceeding was a material error in procedure. It is not stated, however, that the order of the lower appellate Court was *ab initio* null and void. In *King Emperor* v. *Romesh Chandra Gupta* (7), a case of 1917, the High Court of Calcutta, having first held that S. 439 (2) had been sufficiently complied with when the District Magistrate, before referring the question of enhanced punishment to the High Court, had heard the accused, and after itself enhancing the punishment accordingly, subsequently reviewed its own order and set it aside on changing its mind and holding that the accused had a right of being heard before the High Court itself. The Court also did not treat its first order as null and void but "reviewed" it, as it says. With respect I doubt very much the correctness of this decision since it appears to me that S. 369 of the Criminal Procedure Code, as interpreted by that and other High Courts does not confer on a High Court any power of review on the ground that its former view was wrong. See for example *Queen Empress* v. *Durga Charan* (8);

6. (1882) 2 Weir 275 7. (1917) 22 C W N 168.
8. I L R 7 All 672

Somu Naidu *In re* — Wallace, J.

Queen Empress v. *C. P. Fox* (2). *In the matter of Gibbons* (1) and *In re Kunhammad Haji* (5). Nor does any other statute or Letters Patent give it such a power. The Judges in the C. W. N. case seem to me clearly to have overlooked or brushed aside the fact that they had no power to review their first order. In *In re Ranga Rao* a Bench of this Court was asked to review its order dismissing for default a Criminal Revision Petition by a party against an order of the Sessions Judge ordering his retrial, and it was held that no party coming up in revision can claim such a right. It is pointed out to us that in that case the Bench approved of an earlier ruling of this Court in which it was held that, where an appeal had been rejected under S. 421 of the Criminal Procedure Code without the appellant's pleader being heard, (or more correctly without the appellant or his pleader having had an opportunity of being heard) the Court could restore it to file, and this was explained to be a right inherent in S. 421 itself, because that section implies that such reasonable opportunity must be given before the Court has jurisdiction to dispose of the appeal. In spite of some looseness of language, if I may use that expression with respect, in the concluding portion of that judgment implying that, in British India, Courts have no power whatever to restore criminal cases to file since there is no statutory provision for such a course, I think the *ratio decidendi* of that decision is that a High Court has as a rule no power to review its order in revision, because the power to revise is purely a discretionary power regarding the exercise of which no party has a right to be heard at all but that where a party has a legal right to be heard and yet has not been given the opportunity of being heard the Court can and could restore the case to file. Under what statutory power it so restored it is by no means made clear in that judgment. Obviously S. 439 (2) gives to an accused person a right of audience similar to that given by the proviso to S. 421 (1) and it would seem reasonable that, if the failure by the Court to observe the latter provision some how creates a right in the Court to restore the case to file, so ought a similar failure to observe the former provision. The only difficulty is, where is that right to be found? It is clearly, as already indicated, not a right of review of judgment. Can it then reasonably be held that disregard of such a nature of the provisions of the code deprives the Court of its jurisdiction so that its order is null and void? That is I think the view

2. I L R 10 B 176 (F B).

1. I L R 14 C 42 (F B). 5. (1923) 44 M L J 450 : I L R 46 M 382

Somu Naidu *In re.*

Wallace, J.

underlying the 23 M. L. J. case. It is also the view taken obiter no doubt, by Oldfield, J., in I. L. R. 46 Mad. 382 at p. 369, and I think with respect that it is a sound judicial view, and that a reasonable opportunity for the accused to be heard is an essential condition precedent to the exercise of jurisdiction under S. 439, when the Court is considering the question of enhancing the punishment inflicted on him.

I am of opinion then, that the conditions laid down by law as precedent and requisite to the hearing of this case, not having been observed, the Court acted without jurisdiction, and its order is therefore void *ab initio*; and on this ground and on this alone I would base my decision. I would therefore hold that the first order of Krishnan, J., was without jurisdiction and therefore void. The question of the second order is therefore immaterial and the passing of it was unnecessary. It follows that this High Court has not yet pronounced a valid legal judgment in this Criminal Revision case and it is therefore open to this Court to hear the case on the merits.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Kolachina Venkata Seetharamayya and others. *Appellants** (*Plaintiffs Nos.* 1 3, 4, 6, 8 *to* 17, 19, 20, 22, 24, *and* 26)

v.

Veena Tolasi Babu and others *Respondents* (*Defendants Nos.* 2 *to* 22).

Venkata Seetharamayya *v.* Veena Tolasi Babu

Review—Order garnting—Appeal against—Grounds of—C. P. C.—O. 47, R. 7—Grounds specified in—Final decree—Appeal from—Scope of—Appellant if can argue appeal on its merits.

An appeal against an order granting review may be challenged only on one of the grounds specified in O. 47 R. 7 C. P. C.

In an appeal from the final decree itself, if the grounds of appeal relate to the granting of the review, the grounds must be those that are set out in R. 7 The appellant will not, however, be precluded from arguing the appeal on its terms.

Second Appeal against the revised decree of the Court of the Subordinate Judge of Vizagapatam dated the 9th of April, 1920 in A. S. No. 180 of 1917 (A. S. No. 508 of 1916 on the file of the District Court) preferred against the decree of the

*S A No. 409 of 1921. 11th February, 1924.

Venkata Seetharamayya v. Veena Tolasi Babu

Court of the District Munsif of Vizianagaram in O. S. No. 440 of 1914.

P. Narayanamurthi for appellants.

S. Venkatachariar and *S. Srinivasaraghavan* for respondents.

The Court delivered the following

JUDGMENT :—The learned Subordinate Judge granted the application for review either on the ground that there was a mistake apparent on the face of the record or on the ground that there was "other sufficient reason" under O. 47, R. 1. An appeal against an order granting review may be challenged only on one of the grounds specified in O. 47, R. 7. No such grounds exist in the present case and can be urged in this appeal. Then the question arises as this is a final appeal from the decree itself, can the decision be challenged on grounds other than those contained in R. 7? If the grounds relate to the granting of the review, in my opinion, the grounds, must be those that are set out in R. 7. [See *Baroda Churn Ghose* v. *Govinda Proshad Tewary* (1), *Bubiram Chowdhury* v. *Bishea Perkash Naran Singh* (2) and *Gopala Iyer* v *Ramasami Sastrial* (3).] This will not of course preclude the appellant from arguing the second appeal on its merits. It has not been shown that the decision on the merits is wrong. In the result, the Second Appeal fails and is dismissed with costs.

A. S. V. —— *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE VENKATASUBBA RAO.

Gangi Ammal *Appelllant* (Plaintiff)*

v.

Govinda Padayachi and others *Respondents (Defendants).*

Gangi Ammal v. Govinda Padayachi

Sale-deed—Construction—Discharge of debts binding upon property sold—If and when condition precedent to passing of property—Minor—Sale in favour of —Validity—Tests—Transfer of Property Act—S. 55 (5) (d)—Buyer's duty under—Basis of—Implied contract if.

A sale deed was executed in favour of a minor, one of the terms of the deed being that the vendee's father should discharge certain debts binding upon the property sold. The portion of the deed relating to this point was as follows: "the debts shall be discharged and the minor may hold and enjoy the undermentioned lands exclusively with power to alienate by way of gift, exchange sale, etc."

1. (1895) I L R 22 Cal 984. 2. (1897) I L R 24 C 878.
3. (1907) I L R 31 M 49 : 17 M L J 603.

*Second Appeal No. 371 of 1921. 24th January, 1924.

Gangi Ammal v. Govinda Padayachi

Held, on a construction of the deed, *that* the discharge of the debts was not a condition precedent to the vesting of the property in the minor ; that even otherwise the discharge of the debts by the vendee himself was a sufficient compliance with the condition ; and that the sale was not void on the ground that it was in favour of a minor.

The minor is not a contracting party. On the other hand, it is his father who undertakes to discharge the encumbrances ; the sale cannot therefore be treated as void.

The duty that is incumbent upon the buyer under S. 55 (5) (d) of the Transfer of Property Act is not a duty that arises from an implied contract ; it is a statutory obligation imposed on the vendee.

Second Appeal against the decree of the District Court of South Arcot in A. S. No. 161 of 1919 preferred against the decree of the Court of the District Munsif of Vriddachalam in O. S. No. 980 of 1915..

P. R. Ganapathi Aiyar for *T R. Ramachandra Aiyar, T. R. Krishnaswami Aiyar* and *S. Ramaswami Aiyar* for appellant.

N. S. Rangaswami Aiyangar and *C. R. Vasudeva Rao* for respondents.

The Court delivered the following

JUDGMENT :—This suit was instituted for the purpose of recovering certain property after setting aside a sale deed. One Muruga Padayachi executed a deed of sale on the 28th October, 1905 in favour of his sister's grandson Boorasamy. Eleven years after this transaction Muruga Padayachi's widow seeks to set aside the sale on the ground that it was conditional upon the vendee fulfilling certain terms, that there was default on his part and that consequently the sale was inoperative. It is said that one of the conditions was that the vendee should marry an infant daughter of Murugan. Another condition is said to be that the vendee's father should discharge certain debts binding upon the property. In regard to the first condition, the District Judge has held that the marrying by Boorasamy of the daughter of Murugan was not a condition precedent, and with this finding of fact I cannot interfere in Second Appeal. In regard to the second condition, the debts referred to are those covered by Exs. II and A. So far as Ex. II is concerned, the lower appellate Court has arrived at the finding that it was fully discharged. Ex. II is a deed of mortgage, and on it there is an endorsement by Govinda Padayachi.

Gangi Ammal v. Govinda Padayachi.

the father of Booraswami, which shows that Rs. 392 were paid by him on the 9th April, 1906 towards the deed in question. The balance of the amount due under Ex. II was discharged by the execution of a hypothecation bond on the 1st August, 1913 by Booraswami himself, but it is argued that the discharge of the debt by the vendee is no compliance with the condition. I do not see how it can be said that, when there is payment of the debt and discharge of the mortgage, there has been no compliance. It was intended by the vendor that the debts should be paid, and it would be strange to hold that it was not his desire that, if the debt was paid by the vendee himself, the property should not become his absolute property. As regards the second debt, the District Judge has also held that the plaintiff has failed to prove that the first defendant Govinda Padayachi had not paid Rs. 100 which was the amount which he was directed to pay by the sale deed.

Apart from these findings of fact, I think the conclusion of the District Judge is correct, namely that the term that the debts should be paid is not a condition precedent to the vesting of the property in the vendee. The translation before me of the material portion seems to be inaccurate. The correct rendering of the concluding part of Ex. I, the sale deed is "The debts shall be discharged and the minor Booraswami may hold and enjoy the undermentioned lands exclusively with power to alienate by way of gift, exchange, sale, etc." It is perfectly clear that the discharge of the debt is not a condition precedent to the vesting of the property in Booraswami.

The last argument advanced by Mr. P. R. Ganapthay Iyer, the learned Vakil for the appellant, is that the sale deed was taken in the name of a minor and that the transaction is therefore void. I must say in this connection that this contention was given up when the appeal was argued before the learned Subordinate Judge who made the order of remand, and I do not think it is open to the appellant now to raise the point. No doubt this is merely a question of law, and if for the purpose of advancing justice, it would be necessary to allow the appellant to raise afresh a question of law in Second Appeal, I shall not have the slightest hesitation to permit him to do so, but, in this particular case, the object of the contention is to defeat a just claim by a technicality, and I do not think I would be justified in allowing a contention of this kind to be put forward for the first time here when it was expressly given up at an earlier stage. However, in view

Gangi Ammal v. Govinda Padayachi.

of the long argument that was advanced by Mr. Ganapathi Iyer, I may state what my view on this matter is.

In *Navakoti Narayana Chetty* v. *Logalinga Chetty* (1), it was held that a sale in favour of a minor was void, but the ground of the decision is very clearly stated to be that it is impossible to conceive of a sale without there being a contract on the part of the minor. It is said that, if there is a promise to pay a price, it would be invalid as the minor cannot make a contract in regard to the payment of price. If, on the other hand, money was already due to the minor, the transaction is equally void as the minor's consent to make it a price is essential to convert the mere transfer of ownership into a sale. But the Judgment makes the mistake of assuming that these are the only two possible alternatives and a later case that came up for decision, *Munia* v. *Perumal* (2) made clear this mistake. There the minor was not a contracting party and no contractual obligations were undertaken by him ; and the learned Judges, who decided that case, held that the sale in favour of the minor was not void. The minor became the beneficial owner under the deed of purchase but he was not a party to the contract of sale. On that ground, the sale was upheld. The observations in *Navakoti Narayana Chetty* v. *Logalinga Chetty* (1), as I pointed out, are too general, and this is the view taken in a later Full Bench case, *Raghavachari* v. *Srinivasa Raghavachari* (3). In the case before me, there is a transfer in favour of the minor. He is not, however, a contracting party. On the other hand, it is his father who undertakes to discharge the encumbrances and in these circumstances it is obvious that the sale cannot be treated as void. But Mr. Ganapathi Iyer seeks to distinguish the Full Bench case on the ground that there the whole of the purchase money had been previously advanced but that in the present case the price was to be paid on a future date. There is no force in this argument. The principle underlying *Munia* v. *Perumal* (2) is equally applicable to the facts of this case. I therefore am of opinion that the sale in the present case is not invalid.

But then it is said that under S. 55 (5) (*d*) of the Transfer of Property Act, the buyer would be under an obligation to pay off monies due under previous encumbrance that there should be deemed to exist an implied contract to pay the

1. (1909) I L R 33 M 312 : 19 M L J 752. 2. (1911) I L R 37 M 390.
3. (1916) I L R 40 M 388 31 M L J 575 (F B).

Gangi Ammal v. Govinda Padayachi.

monies due under Exs. II and A and the minor being incompetent to contract the sale is void. The stout answer is that, as a matter of fact, there is an express contract between the minor's father and the vendor to discharge the encumbrances and the question of implied contract does not arise.

Even apart from that, I do not think it can be said that the duty that is incumbent upon the buyer under S. 55 (5) (*d*) is a duty that arises from an implied contract ; it is a statutory obligation imposed on the vendee. A mere perusal of the various clauses and sub-clauses of S. 55 will reveal the utter unsoundness of the argument that the section deals with implied contracts and both Sir John Wallis C. J. and Srinivasa Iyengar, J., in *Raghavachari* v. *Srinivasa Raghavachari* (3) expressed the opinion that the duties specified in the section are in the nature of statutory obligations and with respect that seems to be the right view.

The appeal therefore fails and is dismissed with costs.

A. S. V. —— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Bhogi Reddi Kumaraswami *Appellant** (*Defendant*).

v.

Maddekara Narayana Rao agent of Byram Shah *Respondent* (*Plaintiff*).

Kumaraswami v. Narayana Rao.

Indian Limitation Act, S. 19—Acknowledgment—Suit for a definite sum claimed as balance of account—Admission by defendant that account must be taken and settled—Vaild acknowledgment to save limitation.

In a suit brought for a definite sum claimed as due under accounts, an admission by the defendant that accounts must be taken and settled is an acknowledgment of liability and would save limitation.

Andiappa Chetty v. *Alasinga Naidu,* I L R 36 M 68 at p. 70 followed.

Second Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Guntur in A. S. No. 46 of 1920 (A. S. No. 274 of 1920, District Court, Guntur) preferred against the decree of the Court of the principal District Munsif of Tenali in O. S. No. 302 of 1918.

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*Second Appeal No. 899 of 1921. 6th February, 1924.

3. (1916) I L R 40 M 388 : 31 M L J 575 (F B).

Exhibit D-1 was as follows :—

Bhogireddi Kumaraswami offers salutations. Your agent Narayanarao's registered letter, dated 12—3—15 to hand on 1—5—15 and the contents thereof understood. For the sake of accounts connected with your work I stopped at Tenali for 15 days. Though I stopped so long, yet without looking into the accounts,—(illegible) Dhora Garu and Narayanarao Pantulu Garu, stating that they would write for the accounts later on, gave me permission to go home. I then went home. Though I expected for a long time to get a reply again from you, no reply came. Some time afterwards, I myself sent my men to Tenali twice, but no reply whatever was given to them. In January I even went to Tenali and appeared before—(illegible) Dhora Garu in connection with accounts ; but he said that he did not find it convenient then and that he would send word later on. When I went in January I was not told that accounts would be settled and that I should come and begin the work. As there was not much work and as the accounts had not been settled, the labourers went away each in his own way. Again, in March I went to you, and you then told me to bring men and commence work, and I then only told you that it was not then the season when men would be available and that you gave no orders during the days when men would be available. You told me to any how arrange and get 25 men and engage them on work. I said I would if men were available, and I proceeded to several villages and made enquiries for 15 days, but having found none any where, I again went to Tenali, represented the fact to Sri Adinshaw Dhora Garu and came back. So, there is not much work remaining to be done in the sections taken up by me. Even if there be a little, the same might have been finished by Konda Subbarayudu Pantulu Garu who said he would. As regards the sections taken up by me, Adinshaw Dhora Garu wrote in my order book, remarking, in the case of sections completed, as completed, and in the case of sections incompleted, as incomplete. So, in doing your work I had engaged many men and worked very hard. Having consented to bear that loss even, I got your work done to a large extent. In your registered letter you write to say that unless I bring men and commence work, calculation shall be made according to the terms of the agreement and the loss sustained recovered in due course. The agreement provides that

Kumaraswami v. Narayana Rao.

once in every two weeks account should be made and the amount found due be deducted from the amount of advance taken by me from you. Not even once you so made and stated the account and credited the amount towards the advance taken by me from you. Seeing that for such a long time no accounts had been stated, I suspended work, and although I have been frequently coming and going for the accounts, no settlement of account has been made. So, if a reply is sent immediately on receipt of this letter, I shall becoming for the accounts.

Please consider.

(Signed) Bhogireddi Kumaraswami.

A. Venkatrayaliah and *L. Venkatanarasiah* for appellants.

T. Ananda Row and *Ch. Raghava Rao* for respondent.

The Court delivered the following

JUDGMENT :—The only point argued in this appeal is the question of limitation *viz.*, whether defendant's letter Ex. D 1. is an acknowledgment saving the bar. It seems to me quite clear from the terms of that letter that the work as per the agreement to be done by defendant had not then been completed and that the accounts had therefore not been finally settled. This is supported by the finding of the District Munsif that the work was not finished till August 1915. This was a case therefore where the final liability could not be fixed by final accounts until August, 1915. Plaintiff's suit was within 3 years of that date.

As remarked in *Andiappa Chetty* v. *Alasinga Naidu* (1) " in a suit for the balance due on taking accounts an admission that accounts must be taken and settled would be a pertinent acknowledgement. Plaintiff no doubt sues for a definite sum considered by him as due on his accounts but the suit was, in substance, one for accounts as both parties themselves confessed, when they agreed to have it settled by the railway accounts (see Judgment of the Lower Appellate Court).

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1. I L R 36 M 68 at 70.

I find no substance in this appeal and it is dismissed with costs.

C. A. S. *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER AND MR. JUSTICE DEVADOSS.

Meyyappan Servai *Appellant** (*Petitioner-Assignee-Decree-holder*)

v.

Meyyappan Ambalam and others *Respondents* (*Defendants Nos.* 129, 130 *and* 50).

Hindu Law—Joint Family—Father—Decree for possession against—Executability of, against his sons after his death—Sons not parties to suit—C. P. C.—S 53—Decree in, if confined to money decrees—Father—Suit against—Capacity in, representative or individual —Test—Title—Possession—Evidence—Union receipts.

Union receipts are not evidence of title and the payment of Union tax does not show that the person who pays it must necessarily be in occupation.

A decree for possession obtained against a Hindu father sued in his representative capacity in respect of joint family property which the father could sell and which is liable to be sold for his debts can, after his death, be executed against his undivided sons, though they themselves were not made parties to the suit in which the decree was passed.

The word "decree" in S. 53 C. P. C. is not confined to money decrees.

Test to find out whether a Hindu father who is made a party to a suit is sued in his representative capacity or in his individual capacity.

Appeal against the order dated 19th August, 1921 of the Court of the Subordinate Judge of Sivaganga in E. P. No. 555 of 1919 (in O. S. No. 2 of 1908 on the file of the Court of the Temporary Subordinate Judge, Madura).

T. Rangachari and *K. V Rajagopalan* for appellant.

S. Srinivasa Aiyangar, A. Krishnaswami Aiyar and *M. Patanjali Sastri* for respondents.

The Court delivered the following

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*A A O No. 63 of 1922. 15th August, 1923.

Meyyappan Servai v. Meyyappan Ambalam.

JUDGMENTS :—*Devadoss, J.* :—The lessees of the Sivaganga Zamindari brought O. S. No. 68 of 1901 against a number of defendants for possession of about 13 and odd Kurukkams of land lying within the limits of Sekkalakottai, Sivaganga Zamin. The Zamindar was subsequently added as the 4th plaintiff and one Karuthan Ambalam was also added as 5th plaintiff. The suit which was originally instituted in the Court of the Subordinate Judge of Madura East was decreed in plaintiff's favour by the Temporary Sub-Court of Madura on 22—2—1908. The High Court confirmed the decision of the Temporary Sub-Court in A. S. No. 77 of 1909 on 4—2—1914. One Meyyappan Servai is the transferee of the decree and is the appellant herein. Defendants 129 and 130 are the sons of the 61st defendant. They were brought on record after their father's death in E. P. No. 734 of 1918. The appellant applied for execution of the decree against the defendants 129 and 130 in E. P. No. 855 of 1919 in respect of two plots, one rectangular plot on which there is a house and another a triangular plot which is vacant and which is situate to the south of the former. They both form part of the extensive plot decreed to the plaintiffs. The defendants 129 and 130 opposed the application for execution on the ground that they were not the legal representatives of the 61st defendant, that the plots in question fell to their share on partition with their father some years before 1901 when the suit was instituted that the 61st defendant had no right or title to it and the building was put up by them out of their own earnings and that the father was never in possession of the house. The Subordinate Judge of Sivaganga held that the partition arrangement set up by the defendants was not proved, that they were not the legal representatives of the 61st defendant and that they acquired a title to the property by prescription and dismissed the application for execution. Against this order Meiyappa Servai has preferred this appeal and defendants 129 and 130 are respondents 1 and 2. The appeal was fully argued on both sides and there is no reason to doubt the correctness of the finding of the subordinate Judge on the question of the partition arrangement. Mr. S. Srinivasa Iyengar stated that he did not rely on the partition set up by his clients. His contention is that the defendants 129 and 130 are not the legal representatives of the 61st defendant and they being members of an undivided Hindu family the decree against the 61st defendant could not be executed against them.

Before considering the question of law raised, it is necessary to consider what facts are established by the evidence.

The appellant's contention is that the rectangular plot was acquired by the 61st defendant from defendants 40 and 50 and the triangular plot was never the property of the 61st defendant and has always belonged to the 50th defendant. Ex. B is a sale deed executed on 16—8—1901 in favour of Annamalai, 61st defendant, and one Poosalan by defendants 40 and 50 in respect of the rectangular plot. It was attested by Udayappa Chetty, Ramanadhan Chetty and one Seshayya. P. W. 2 Chinniyan Ambalam, one of the executants of the document, and Ramanadhan Chetty, P. W. 8 one of the attestators have been examined as witnesses and they speak to the execution of the document . and sale by defendants 40 and 50 to the 61st defendant. Ramanadhan Chetty P. W. 8 was a mortgagee of the whole plot prior to the sale. He also purchased a plot from defendants 40 and 50 under Ex. XVII which was executed on the same date as Ex. B. Ramanathan Chetty P. W. 8 is a respectable witness and there is no reason why he should perjure himself in favour of Meyyappan Servai. His evidence explains a number of circumstances which otherwise could not be explained and there is no reason why his evidence should not be accepted as true. The Subordinate Judge's remarks about his evidence are not warranted by the facts on record. It is difficult to see how Ex. B could be treated as a sham transaction. That it is a real transaction receives support from Ex. I, sale deed, dated 10—4—1901 in favour of the 61st defendant executed by the 50th defendant only. Evidently the 61st defendant was not satisfied with the sale from one of the co-owners of the plot. The whole plot of 13 Kurukkams and odd were purchased by three persons 40th and 50th defendants and another from the Kottayur Vallambars and that is the reason why Ex. I was superseded by a later document executed 4 months after, by the two people who had a title to convey. In this connection a few documents which are opposed to the present contention of the defendants may be noticed. Ex. E is a deposition of defendant 130 made so far back as 4—2—1902 in which he says : "I have a house at the place which is the subject-matter of the civil suit. It was purchased by my father. Poosalan is my next-door neighbour. He and I together built a new house." Here is a distinct admission that the site was purchased by the father, and that statement could only refer to

Meyyappan Servai v. Meyyappan Ambalam

Ex. B by which the 61st defendant bought the site. Ex. IV is a hypothecation bond executed on 28—1—15 by defendant 130 in favour of his son-in-law in which he says that the house, etc., were purchased by him out of his self-acquisition. The present case is that defendants 129 and 130 built the house out of their own earnings in 1898. It is difficult to reconcile their present contention with the statement in Ex. IV. It is significant that defendant 130 has not ventured into the box to explain the various statements in these documents. Defendant 129 who is the younger brother of defendant 130 has been examined as a witness. His evidence is that he was away for some years and that he did not know what happened during that time and that he built the house before 1901. Ex. II is a kararnama, dated 13—10—1900 entered into between him and his partner which shows that the trade he was carrying on resulted in loss. He must have been quite a young man before 1900 and very strong evidence is needed in order to make out that he built the house out of his earnings. His evidence is not satisfactory and cannot be accepted. Reliance is placed on the recital in Ex. I that there was a building on the site sold. It is argued from this, that the building must have existed before the date of Ex. I and that that could only have been put up by the defendants 129 and 130. In the first place there is no satisfactory evidence as to the nature of the building on the plot conveyed under Ex. I. The word is '*Gettikattadam*' which may mean a small shed or a house, and even if there was a building on it, it does not follow that defendants 129 and 130 must have built it. It is urged that inasmuch as the value of the building was not taken into consideration at the time of the sale, Ex. I, and Ex. B were never intended to take effect. No doubt what was sold under Ex. I and Ex. B was the site, and it is very probable that when there was a dispute between the Zamindar and the villagers, a number of people in order to make out title put up small building to show possession and enjoyment. But that would not confer any right against the Zamindar. The distinct finding in the suit is that the trespass was within ten years before suit. Ex. XII under which defendants 40 and 50 claim title to the plot was executed by the Kottayur Vallambars on 18–1–1892. So, no inference can be drawn against the *bona fides* or the binding nature of Ex. B from the mere fact that the villagers put up small buildings on the land in dispute in the suit and

agreed to have it parcelled out among themselves. It is significant fact that the 61st defendant took two documents, Ex. I and Ex. B, from the persons who claimed title to the land under the Kottayur Vallambars. Ex. D is an award made by some arbitrators in consequence of a dispute between the 50th defendant and the 61st defendant as regards the triangular plot in which, there is a statement that Annamalai Ambalam and his son Vellayya Ambalam, defendants 61 and 130, admitted that their land on which they built the house was sold to them by Chinnayyan Ambalam, 50th defendant. The story now told that the father lived away from the family is inconsistent with the recitals in these documents and the present contention that the defendants 129 and 130 got the plots on partition or that they acquired it independently of their father was never put forward before. Taking all the circumstances into consideration I hold that the rectangular plot was purchased by the 61st defendant from the defendants 40 and 50 under Ex. B during the pendency of the suit and the triangular plot never belonged to the 61st defendant or his sons.

It is contended that the defendants 129 and 130 have acquired a title to the plots in question by prescription. It is difficult to see how they could have acquired a title by prescription. The finding in these cases is that the trespass by the defendants was within 10 years before the suit. So they could not have acquired by prescription a title against the Zamindar before the date of the suit. They could acquire a title by prescription only if the plots were not included in the suit or the persons in real occupation of the plots were not made parties to it. There is nothing to show that the father was not in possession of this rectangular plot. There is nothing to warrant the supposition that the plaintiffs omitted to make the defendants 129 and 130 parties to the suit when they were in exclusive possession of that plot and that they made 61st defendant a party who was not in actual possession. The defendants never pleaded that their title was traceable to trespass by them and that the father was not in occupation of the plot. The plots in question are admittedly parts of the extensive piece of land claimed by the plaintiffs and decreed to them as the plan attached to the decree shows. The onus is very heavily on the defendants to show that they were in exclusive occupation of the plots before the suit and that the plaintiffs failed to make them parties. They have not been able to discharge the onus, and I have no hesitation in

Meyyappan Servai v. Meyyappan Ambalam

holding that they were not in exclusive possession of the plots in dispute. On the other hand, the evidence on record supports the contention that the father was in occupation and that he claimed title to them under Ex. B. A number of union receipts are produced for the purpose of showing that defendant 129 was in occupation to the exclusion of the father. Union receipts are not in the first place evidence of title and the payment of Union tax does not show that the person who pays it must necessarily be in occupation. It is next contended that defendants 129 and 130 are not the legal representatives of the 61st defendant and the decree against the father cannot be executed against the sons. Mr. Srinivasa Iyengar fairly admitted that if it be held that the 61st defendant was sued in a representative character his clients would be bound by the decree and they could not resist execution. But his contention is that there is no evidence to show that the father was sued in a representative capacity and that the defendants 129 and 130 being undivided members of the joint Hindu family, the decree against their father alone cannot bind the sons and cannot be executed against them after father's death. Considering the array of the defendants in the case and considering the fact that in no case were the father and son made parties to the suit, the inference can safely be drawn that the plaintiffs made the managing member of each family, parties to the suit and they did not implead the defendants in their individual capacity. When a suit is brought in respect of the family property impleading the father as a defendant, the decree passed against the father binds the sons. The case of a managing member other than the father may perhaps stand on a different footing. But where there is a dispute about property which is admittedly family property and when the father is made a party to the suit, it cannot be said that the father is made a party in his individual capacity and not as the manager of the family. In Trevelyan on Hindu Law at page 278 there is the following passage "The members of a family are all bound by a decree obtained *bona fide* against the father, or other manager, as such manager, for a debt duly incurred in the management of the property, whether it were or were not charged upon the family property, and by a sale of the family property in pursuance of such decree, or in a suit brought against the manager of a joint family business in respect of such business, or in any suit brought in respect of the family property although they were not parties to the suit."

In *Meenakshi Achi* v. *Chinnappa Udayan* (1), it was held that the decree for maintenance against the father which gave a charge in favour of the plaintiff could be executed against the son after the death of the father even though the son was not made a party to the suit. In *Kamal Kutti* v. *Ibararji* (2), it was held that a decree obtained against the Karnavan of a Malabar tarwad could be executed against the tarwad property. The question in all these cases is, what was the nature of the suit and what was the relief claimed ? The mere form should not be held to decide the question one way or the other. The contentions of the parties to the relief claimed and the relief decreed should be considered in arriving at a decision as to whether a person was made a party in his individual capacity or as representing the family. In *Sheo Shankar Ram* v. *Jaddo Kunwar* (3), their Lordships of the Privy Council held: "There are occasions including foreclosure actions, when the manager of a joint Hindu family so effectively represents all the members of the family that the family as a whole is bound. *Vide* also *Marivitti Mathu Amma* v. *Puthram Kunnot Cherikot* (4). In this case there is no allegation that the father was negligent or acted against the interests of the family. He no doubt remained *ex parte*. But that does not necessarily mean that he was careless of the interests of the family. All the defendants had one common purpose, namely, that of claiming the property in the suit as the property of the Kottayur Vallambars and that Zamindar had no title to it. The defendants did not put up separate defences, and, they had only a common defence. The mere fact therefore of the 61st defendant remaining *ex parte* does not lead to the inference that he was either careless nor indifferent to the interests of the family. When a number of defendants have a common interest, and when the contest is carried on by some of them against the claim of the plaintiff *bona fide* the defendants who are *ex parte* are as much bound by the decision in the case as those who are not *ex parte*. In *Gopalacharyulu* v. *Subbamma* (5), it was held "A decision in a suit instituted and conducted *bona fide* by some only of the Agraharamdars of a village against the Zamindar and the other Agraharamdars for a declaration as to the Kattubadi payable by them to the

1. (1901) I L R 24 M 689.
2. (1901) I L R 24 M 658.
3. (1914) I L R 36 A 383. 4. (1906) I L R 30 M 215.
5. (1919) I L R 43 M 487 : 38 M L J 493.

Meyyappan Servai v. Meyyappan Ambalam.

Zamindar, is *res judicata* against the representative of a Agraharamdar who was a defendant, but died pending the appeal whose legal representative was accidentally not brought on record either in the appeal or the second appeal." This case and the case in *Sheoshankar Ram* v. *Jaddo Kunwar* (3) are clear authorities for the position that if by mistake or oversight persons who have an interest in the property in dispute are not joined as parties but a preson or persons who could represent the interest of such persons are made parties the decision would bind all those who have an interest in the property. It must be so in the case of an undivided joint Hindu family. Can it be reasonably contended that if children are born to the members of the joint Hindu family during the pendency of a suit extending over several years, the shares of the after-born children are not bound inasmuch as they are not parties to the suit. It is very strongly urged that S. 53 of the Civil Procedure Code applies only to money decrees and that if a decree is passed in respect of family property against the father it cannot be executed against the sons. It is very difficult to see how if the decree binds the members of the joint family it cannot be executed against them. Mr. Srinivasa Iyengar's contention is that a separate suit should be brought for enforcing the decree. Under O. 21, R. 35, possession can be taken from all persons who are bound by the decree. But it is urged that S. 53 should be read as applying only to money decrees passed against the father which could be executed against the sons or other descendants. S. 53 is a new section which explains the expression legal representative contained in S. 50. It was intended to reconcile the conflict of views, that existed between the Bombay and the Madras High Courts. It is in these terms: "For the purposes of S. 50 and S. 52, property in the hands of a son or other descendant which is liable under the Hindu Law for the payment of the debt of a deceased ancestor in respect of which a decree has been passed, shall be deemed to be property of the deceased which has come to the hands of the son or other descendant as his legal representative." As I understand the section if the property is one which is liable under the Hindu Law for the payment of a debt of a deceased ancestor that property shall be deemed to be property which has come to the hands of the son or other descendants, as his legal representative. The contention of the respondent would necessitate the addition of the

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3. (1914) I L R 36 A 383.

words " in respect of the decree so obtained. " There is no warrant for adding these words, and it must be held that where a decree is passed against the father in respect of property which would ordinarily be liable under the Hindu Law for the payment of his debt that that property is the property of the deceased in the hands of the son or other descendant for the purposes of S. 50 and S. 52. Great reliance is placed by the respondents upon a decision of the Bombay High Court in *Chunilal Harilal* v. *Bai Mani* (6). In that case a decree for injunction was sought to be executed against the surviving co-parceners, who were not parties to the decree. It was held that the surviving co-parceners were not bound by the decree ; for, on no construction of the term " legal representative " could the members of a joint Hindu family be brought, within its definition, as contained in S. 2 (11) of the Civil Procedure Code. Heaton, J. in the course of his delivering the Judgment observes as follows " The decree-holder justified his right to do this on the ground, the only possible ground that he could take, that the sons were the legal representatives of the persons against whom the decree was obtained. There is a definition of the expression " legal representative " in the Code of Civil Procedure. The sons here certainly do not fall within the meaning of that definition. They do not in law represent the estate of a deceased person and they are not persons on whom has devolved the estate of a person sued in a representative character. So long as they do not come within the definition of " legal representative " then of course it is futile for the decree-holder to refer to S. 50 or S. 52 of the Code. But it is urged that S. 53 gives to the decree-holder in this case a legal right to enforce the injunction against the sons of the brother ; and that might be so if S. 53 were purely descriptive of the kind of property which was deemed to be property of the deceased which has come to the hands of the sons or other descendants as their legal representatives. If that section were purely descriptive and not limitative, then there would be force in the contention I am considering. But I think it is limitative as well as descriptive. " With all respect to the learned Judges I am unable to agree with their view that S. 53, C. P. Code is limitative and not descriptive. The Judgment can however be supported on the ground that an injunction is purely a personal

6. (1918) I L R 42 B 504.

Meyyappan Servai v. Meyyappan Ambalam

remedy and a decree for injunction obtained against the fathers apprehended interference with the plaintiff's property cannot bind the sons who are not parties to the suit. This decision has been followed in *Dwarka Das* v. *Krishna Kishore* (7). There the brother of a deceased member of a joint Hindu family was sought to be brought within the definition of the expression "legal representative." It was held that he was not his legal representative. The case has no application to the facts of the present case. It is well settled that a decree against a member of a joint Hindu family cannot be executed after his death against the family property in the hands of the other members unless he was sued in a representative capacity; but where the dispute is about property, which is liable to be sold for payment of the debt of a deceased ancestor a decree against him in respect of that property is binding upon the son or other descendant of the deceased ancestor. If the property could be made liable for the debt of a deceased ancestor it is difficult to see why a decision in respect of such property should not be held to be binding upon persons who are the descendants of such ancestor. The position of a father is different in several respects from that of an ordinary manager of Hindu family; and in view of that, the law allows execution of a decree passed against the father against joint family property in the hands of the sons, the limitation being that the property should be such as would be liable for the payment of his debt. In *Sahib Thambi Marakayar* v. *Hamid Marakayar* (8), it was held "The general rule of law, undoubtedly, is that in suits where one person is allowed to represent others as defendants in a representative capacity any decree passed can bind those others, only with respect to the property of those others, which he can in law represent, and no personal decree can be passed against them, although the parties on record *co nominee* may be made prsoneally liable. This is the principle applied in suits against a Hindu family, as represented by its managing member, and in suits to which O. 1, R. 8 of the C. P. Code, 1908, is applicable." In this case, taking all the circumstances into consideration, I have no hesitation in holding that the father, 61st defendant, represented the family. The defendants 129 and 130 cannot object to the execution of the decree, on the ground that they were not parties to the suit. The decree was passed in respect of the family property which

7. (1921) 61 I C 628.
8. (1911) 2 M W N 534.

Meyyappan Servai v. Meyyappan Ambalam.

the father could sell and which is liable to be sold for his debts. In this view also, I hold that the contention of the respondents must fail. In the result the appeal is allowed with costs in both Courts.

Spencer, J.

Spencer, J. :—Mr. Srinivasa Iyengar conceded that if the respondents were bound by the Judgment in O. S. No. 68 of 1901, as they must be, if they claimed through the 61st defendant, they could not set up any title by adverse possession.

But he argued that there was no proof that the 61st defendant was other than a trespasser, and secondly that there was no authority for holding that any decree obtained against the manager of a joint family, other than a decree for the recovery of a debt, could be executed against the members of that family, who succeeded to the family property by survivorship unless they were parties to the decree.

On the facts it seems to be clear from the admission of Meyyappan (129th respondent) at the enquiry in the lower Court, from the admission of Vellayan (130th respondent) in prior proceedings (Exs. E and D) that the disputed site was ancestral property acquired by purchase and partitioned between the 61st defendant (Annamalai) and his sons (129th and 130th respondents); and from the statement of Chinniah Ambalam (50th defendant and P. W. 2) and from Exs. B and I it appears that the purchase was made *pendente lite* from the 40th defendant and another, who themselves purchased from the Kottaiyur Vallambars who set up rights opposed to those of the Zamindar of Sivaganga in the suit.

As the father of respondents 129 and 130 and the Kottaiyur Vallambars were all litigating *bona fide* under the same title, all, including the 61st defendant's sons, are equally bound by the result (Vide *Gopalacharyulu* v. *Emmani Subbamma* (5).

The point of law as to execution based upon Baman and Heaton, JJ.'s Judgments in *Chunilal Harilal* v. *Bai Nani*(6) is a very strange and novel one to my mind. Those learned Judges declare that S. 53, C. P. C., is limitative and not descriptive. With due respect I can see no justification for limiting the word 'decree' in S. 53 to that class of decrees which are known as money decrees. The limitation in S. 52 is express. But S. 53 refers both to S. 50 and S. 52, seeing that when the legislature intends to make a limitation, the same is clearly expressed, as it is in S. 52, there is every reason against implying such limitation when it is not expressed in S. 50. If

5. (1919) I L R 43 Mad 487.
6. (1918) I L R 42 Bom 504.

Meyyappan Servai v. Meyyappan Ambalam. Spencer, J.

the word 'decree' is to be understood as used in that limited sense in S. 53, how is it to be understood in Ss. 49 and 50 ? Nobody has ever hitherto thought of suggesting that no other decree except decrees for money can be transferred or can be executed against legal representatives of judgment-debtors.

In *Kamal Kutti* v. *Ibrayi* (9), Benson, J., observed pointedly that if members of a family are bound by a decree obtained against the manager it was difficult to see on what principle they could be treated as strangers to the decree for the purpose of execution. If the decree could be executed against them this implied that they were parties or representatives of parties. In *Ananthanarayana* v. *Swaminatha Iyer* (10) a decree for the recovery of immoveable properties obtained against a father of a family governed by Mitakshara Law was held to be executable against the sons.

In *Sahib Thambi Marakkayar* v. *Hamid Marakkayar* (8) it was stated that in suits against a Hindu family as represented by its managing member any decree passed would bind those others with respect to their property which he can in law represent.

It is unnecessary to multiply authorities. It seems too obvious a proposition to require to be supported by a series of decisions. I agree with my learned brother that the lower Court's order cannot be supported and that the appeal should be allowed with costs in both Courts.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Mantripragada Gourikantam and others *Appellants** (*Defendants* 1 *to* 4)

v.

Mantripragada Ramamurthy and others .. *Respondents* (*Plaintiff and defendants* 5 *to* 7).

Gourikantam v. Ramamurthy

Inam—Service Inam—Enfranchisement and issue of a title deed—Creation of a new title in favour of grantee—Exclusive possession against grantee prior to enfranchisement—Effect of—Adverse possession.

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9. (1901) I L R 24 M 658. 10. (1914) 1 L W 643.

8. (1911) 2 M W N 534.

*S A No. 1752 of 1922, 31st January, 1924.

Gourikantam v. Ramamurthy

The enfranchisement of a service inam and the issue of an inam title-deed create a new title in the grantee.

Venkata Jagannadha v. *Veerabhadrayya,* I L R 44 M 643 followed.

Lakshminarasimham v. *Venkataratnayamma,* 30 M L J 334 doubted.

Whether 1st defendant was in exclusive possession of the service inam lands from 1905 and the inam was enfranchised in 1911 and a title-deed was then issued in favour of the plaintiff, the 1st defendant and others and the 1st defendant continued even afterwards in exclusive possession, the period of exclusive possession from 1905 to 1911 will not count as adverse possession against the plaintiff as regards the title conferred by the inam title-deed of 1911, provided that the Government's right to resume the lands in 1911 was not barred.

Neelachalam v. *Kamaraju,* 14 M L J 438 and *Kotirajudu* v. *Venkataratnam,* 38 M L J 320 considered.

Second Appeal against the decree of the Court of the Additional Subordinate Judge of Vizagapatam in A. S. No. 154 of 1922 (A. S. No. 395 of 1921 on the file of the District Court of Vizagapatam) preferred against the decree of the Court of the Additional District Munsif of Vizianagaram in O. S. No. 212 of 1921 (O. S. No. 28 of 1920 on the file of the Court of the Principal District Munsif of Vizianagaram).

Suit in January 1920, for partition and separate possession of a half share in the plaint scheduled land with Rs. 15 past mesne profits. The plaintiff's case was that the land was the joint property of himself and the 7th defendant and was in their possession and enjoyment till it was trespassed upon by 1st defendant about 4 years prior to suit. Defendants 2 to 4 were the undivided sons of the 1st defendant; 5th defendant his mortgagee and 6th defendant his lessee.

The 1st defendant and his sons contended that the plaintiff, the 7th defendant and the 1st defendant each held a third share in the plaint land, that the 2|3 share of the plaintiff and the 7th defendant were conveyed away to the 1st defendant for consideration on 9—9—1905, that ever since the 1st defendant had been in exclusive possession of the plaint land, that the first defendant had been in possession for more than the statutory period, and that the plaintiff's claim was in any case barred.

The District Munsif held the arrangement of 1905 was true, that the defendants 1 to 4 had been in exclusive possession of the suit land since then; and he dismissed the suit.

On appeal the Subordinate Judge held that the suit land being admittedly part of Mirasi Karnam Service Inam, the

Gourikantam v. Ramamurthy

arrangement of 1905 could not affect it. And as the Inam had been enfranchised in favour of the plaintiff and 3 others in 1911, the plaintiff was entitled from that date to 1|4th of the Inam and therefore to 1|4th of the suit land; that his title accrued only in 1911 and therefore the suit was in time. He relied on 41 M. L. J. 1 (P. C.).

In the result he gave the plaintiff a decree for 1|4th the suit land and proportionate mesne profits.

Defendants preferred this Second Appeal.

Y. Suryanarayana for appellants :—The learned Subordinate Judge has misread the decision in 44 Mad. 643 : 41 M. L. J. 1 (P. C.). That case merely decided that the family of the office-holder for the time being has no interest in a Karnam Service Inam. There the patta was issued to the office-holder on enfranchisement and it was held that he got the land as his absolute property. In the present case the patta is issued to 4 persons. Of them only the office-holder gets the title to the land. See 30 M. L. T. 334. This case must go back for a finding as to who was the office-holder at the date of the enfranchisement, *i.e.*, in 1911. If the plaintiff was not then the office-holder, he would get nothing. The enfranchisement cannot affect the rights pre-existing in the inam of the office-holder.

In any event, the 1st defendant has been in exclusive possession since 1905, for 14 years before suit. His title by prescription is complete. Title to service inams may be acquired by prescription. See 14 M. L. J. 438 and 38 M. L. J. 320. These decisions have been followed in a recent case in 45 M. L. J. 791. The District Munsif has given no finding on the question of adverse possession. For that again the case must be remanded.

K. N. Rajagopal Sastri, for *B. Satyanarayana*, for 1st respondent (plaintiff).

The enfranchisement of a service inam stands on a different footing from that of a personal inam. In the latter the inamdar has a particular free-hold estate, for a life or lives, or an estate in tail male, as the case may be ; the Government have only the remainder or the reversion, and on enfranchisement they give up in consideration of an annual quit-rent, their reversionary rights to the inamdar, whose estate is thus enlarged into a fee simple or absolute ownership. In a service inam like the Karnam's, the whole ownership is always in the

Government. The office-holder has no terms definite or indefinite but merely enjoys the income as his wages, and his right to the land is co-extensive with his tenure of office. See 44 Mad. 643 P. C. So the enfranchisement of a Service Inam is in reality a resumption and re-grant to the persons named in the title deed. The power of the Government to resume the inam at their pleasure cannot be denied, as the office-holder has no particle of ownership in the Inam. The Government through the Inam Commissioner having disannexed the inam from the condition of service, and granted it to 4 persons, the latter gets an absolute title to the land. The decisions in 26 Mad. 339 and 30 Mad. 434, F. B. have been expressly disapproved by the Privy Council and are no longer law. The case in 30 M. L. T. 334 proceeds upon a misapprehension of the effect of Madras Act VIII of 1869. That Act is in terms retrospective, applicable only to title-deeds issued " here-to-fore, " *viz.*, before its enactment. Simultaneously with it, the form of the title-deeds thereafter to be issued was revised. See Inam papers, pp. 287, etc. Moreover that Act was intended only to save occupancy rights in lands out of which the inams were derived. See also the Preamble. Further the decision on this point in 30 M. L. T. 334 is obited and not binding on this Court. On the other hand in the cases in 22 Mad. 204 (which is on all fours with the present case) and in 20 Mad. 454, title-deeds issued in favour of persons not office-holders at the time of the enfranchisement were upheld. The case in 30 M. L. T. 334 has been dissented from on this point by a Bench of this Court in S. A. No. 287 of 1921 (unreported), where also it was held that the Inam patta is a fresh root of title and the person named in it gets a good title to the inam whether he is the office-holder or not.

On the point of adverse possession also, I submit the learned Subordinate Judge was right. I am willing to argue taking the facts at the worst against me, that assuming that neither the plaintiff or the 1st defendant held the office after 1905, and that the latter's possession since 1905 was therefore adverse to the office itself. My submission is two-fold :-

Firstly :—Title to land can be acquired by grant or prescription. The transfer in 1905 by the plaintiff in favour of the 1st defendant is admittedly void as it is opposed to S. 5 of the Madras Act III of 1895. The 1st defendant cannot rely on the subsequent accrual of title to the plaintiff in 1911 ; for S. 43 of the Transfer of Property Act is inapplicable to this case : 41 M. 418, (F. B.). Title by prescription is a mode

Gourikantam v. Ramamurthy

of acquiring ownership created by the Limitation Acts. Unless ownership is transferred in some manner known to the law, it will continue in the same person. In 1905 the ownership of the inam land was in the Government, as up to then the inam was admittedly in the enjoyment of the family of the office-holders without any partition. But before 1911 the Civil Courts had no jurisdiction over the emoluments of the office (S. 21 of Madras Act III of 1895) and the Limitation Act had no application. Any possession of the appellants prior to 1911 therefore cannot be of any avail. See 21 Mad. 134 and 9 M. L. T. 430. Those were cases under Madras Regulation VI of 1831, but this Regulation has been repealed and re-enacted in Madras Act III of 1895 and then for the first time made applicable to Karnam Inams in proprietory estates, In 14 M, L. J. 438 the inam was situate in an estate and the adverse possession pleaded was complete before 1895, *i. e.*, before the jurisdiction which the Civil Courts had by virtue of Madras Regulation XXIX of 1802 was taken away by Madras Act III of 1895. Before this Act the inam in that case had become dis-annexed from the service. The report in 38 M. L. J. 320 does not give the facts. From the arguments in the same case in 59 Ind. Cas. 65 it would appear that the facts were similar to those in 14 M. L. J. 438. The case in 45 M. L. J. 791 is concerned with a Khaji's inam. In our case the 1st defendant's possession commenced in 1905, when the inam was yet unenfranchised and, when the Limitation Act did not apply. Nothing could have prevented the Government from resuming the inam even 60 years after 1905, as even after that length of time the 1st defendant could not acquire a title by prescription and the ownership would continue in the Government. So the possession of the 1st defendant could count only from 1911 when the enfranchisement took place, and the Civil Courts' jurisdiction over the suit land was restored and the Limitation Act became applicable. From 1911 only 9 years had elapsed before the Plaintiff's suit and it was therefore perfectly in time.

Secondly :—The 1st defendant could not acquire a title by prescription to land which was inalienable by Statute. Madras Regulation VI of 1831 makes Karnam Service Inams (not in estates) inalienable by sale, mortgage or otherwise. This would include alienation by operation of limitation law (even if applicable). The words of Madras Act III of 1895, S. 5 are not quite so sweeping, but the marginal note " inalienable,"

and the whole scheme of the Act, show, it is submitted, that no change of policy was intended by the Legislature. See on this point 47 Bom. 798 P. C. where the correctness of 9 Bom. 198, F. B. is doubted. That the object of the Government has always been to keep full control over the service Inams (especially of Karnams) is clear from 44 Mad. 643, P. C. On this ground also, the 1st defendant's possession became adverse to the Plaintiff only in 1911 and the suit was in time.

Y. Suryanarayana in reply.—A case in 2 M. H. C. R. 327 lays down that enfranchisement cannot create rights where none existed before. (K. N. R. Sastri. That was a personal inam). The principle laid down by Bhashyam Iyengar, J., in 26 Mad. 339 is not affected by the Privy Council decision in 44 Mad. 643. In 20 Mad. 454 both the grantees were office-holders at least at the time when the resolution to enfranchise was come to. 22 Mad. 104 and the unreported case cited are against me, but I submit that 30 M. L. T. 334 was correctly decided. As to the effect of Madras Act VIII of 1869, see 1 L. W. 329 at 332. On the second point, the Limitation Act of 1871 and 1877 specially exempted from their operation service inams to which Madras Regulation VI of 1831 applied. There is no question of general principles here. That Regulation has since been repealed, and the Limitation Act of 1908 does not re-enact any exemption and in favour of inams to which Madras Act III of 1895 may apply. My learned friend cannot claim the special period prescribed by Art. 149 as that applies only when the Secretary of State is a party. An assignee from the Government has not the same privilege. (Wallace, J. You would say that the Government might have something to grant, say, 30 years after its dispossession, but the grantee would get nothing.) It has been so held.

Y. Suryanarayana for appellant.

B. Satyanarayana and *K. N. Rajagopala Sastri* for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff, the seventh defendant and another were the sons of one Bayyapuraju. The plaint property was a mirasi karnam inam enfranchised in the names of the seventh defendant, the plaintiff and Suryanarayana, who were the three sons of Bayyapuraju, and the first defendant, who is the brother of Bayyapuraju. Suryanarayana died long ago. The plaintiff sued for one half share in the property on

Gourikantam v. Ramamurthy

the footing that first defendant had no right in it. The first defendant relied on a family arrangement in 1905 in which the plaintiff and the seventh defendant gave up their third shares to the first defendant. The District Munsif upheld that arrangement and dismissed the suit on the ground that the first defendant had been in adverse possession for more than 12 years since 1905. In the lower appellate Court it was argued that, as the enfranchisement of the inam was in 1911, the property was until then the absolute property of Government, that the first defendant, if he was from 1905 to 1911 prescribing for a title for adverse possession, could so prescribe against Government only and had not completed such title, that no adverse possession was running from 1905 against the plaintiff since the plaintiff's title only began in 1911, and that the title of any of the grantees under the Inam title deed began only on the date of the enfranchisement, namely in 1911. The lower appellate Court accepted that argument, and gave a decree for plaintiff. The first defendant appeals.

There are two main lines of argument for the appellant, first, that enfranchisement and grant of an inam title deed mean nothing more than a removal of the service obligation on the land and does not in any way affect the manner in which the land was previously held or affect the rights of those previously holding it, whether members of the service holder's family or outsiders ; and secondly that, even if it be held that the inam title deed implies total resumption by Government and re-grant that re-grant will not avail to disturb the pre-existing rights in the land, of persons not claiming any title or *spes* in the office, and, particularly will not rid the land of any right in the land acquired by outsiders by adverse possession. These points were argued on the assumption that, if the enfranchisement does not avail to break the running of the adverse possession in favour of the first defendant, then the first defendant's title by adverse possession is perfected.

On the first point I am quite clear that it cannot now be considered good law in the face of the Privy Council pronouncement in *Venkata Jagannadha* v. *Veerabhadrayya* (1). That decision interpreted an inam title deed of exactly the same terms as the present one and of almost the same date. It lays down clearly that the lands comprising the emoluments of the karnam office are attached to the office as such, so that,

1. (1921) I. L. R. 44 Mad. 643 : 41 M. L. J. 1 (P. C.)

even if a stranger to the family is appointed, the land goes with the appointment, that eligibility to the office is a personal matter, that the land goes with the office and is impartible, and that Government, in the act of enfranchisement, severs the land from the office and allows the office-holder for the time being to enfranchise it. The Full Bench ruling in *Venkata* v. *Rama* (2) and other rulings which have followed it are approved in that decision, and other rulings of this Court which do not follow *Venkata* v. *Rama* (2) for example *Gunnaiyan* v. *Kamakshi Iyer* (3) and *Pingala Lakshmipathi* v. *Bommireddipalli Chalamayya* (4) are disapproved of. The whole trend of that decision was set out and relied on in Second Appeal No. 287 of 1921 in this Court, with which I respectfully agree. It was there clearly pointed out that the distinction between the enfranchisement of a service inam and that of a personal inam is that the latter is a mere release of the service obligation, release by the Crown of its reversionary interests, while the former is a resumption of the land by Government and a re-grant of it to whomsoever Government pleases, although no doubt ordinarily the re-grant would be to the holder of the office at the time of the enfranchisement. The appellant relies on the wording of Act IV of 1862, Act IV of 1868 and Act VII of 1869 and the ruling in *Lakshminarasimham* v. *Venkataratnayamma* (5). The first two Acts are mere legal statements of the evidentiary value of the inam title deed, while Act VIII of 1869 seems to me merely to save the existing rights of occupancy holders or kudivaramdars already on the land. It has been pointed out to me that Act VIII of 1869 in terms only applies to inam title deeds " heretofore issued " and this point seems to have been overlooked, if I may say so with respect, by Spencer, J., in *Lakshminarasimham* v. *Venkataratnayamma* (5). It does not follow from that Act that inam title deeds issued after it did not create a title where no title existed before. The other learned Judge, Ramesam, J., proceeded on the footing that *Venkata Jagannadha* v. *Veerabhadrayya* (1) does not prevent an aggrieved party, whose name was already in the title-deed, from showing that another name was included in it by mistake. I may also note that the pronouncement on

2. (1884) I L R 8 Mad 249

3. (1902) I L R 26 Mad 339. 4. (1906) I L R 30 Mad 434 : 17 M L J 101.

5. (1921) 30 M L T 334. 1. (1921) I L R 44 Mad 643 : 41 M L J 1 (P C).

Gourikantam v. Ramamurthy

this point in that case was not necessary for the decision of the case, since the decision proceeded on a finding of estoppel *aliunde*. I therefore follow what I conceive to be the *ratio decidendi* of the 44 Mad. case and hold that the enfranchisement of a service inam and the issue of a title-deed thereupon create a new title in the grantee. I do not in any case understand the first defendant to contend here that the name of the plaintiff was included in the inam title-deed by mistake other than failure to give effect at the time of the issue of the title-deed to his own title by adverse possession. There is no plea before me, for example that the grantees were not at the time holders of the service.

This brings me to the second point, namely, whether assuming that the first defendant has been in exclusive possession of the land for more than 12 years before suit, that prescriptive title can avail against the rights of the grantees under the title-deed. Such an argument has been considered in S. A. No. 287 of 1921 quoted above, and it was there decided that no one claiming adversely to the inam title-deed can succeed on prescriptive title, unless he proves either, that there was no inam at all, or that Government had no right left in it at the time of the resumption, that is, that his prescription was for more than sixty years at the date of the grant. The first alternative does not arise here since it is not contended that the land was not service inam. As to the second alternative the appellant argues that it is not necessary for him to prescribe against Government, and that it is sufficient if he had prescribed against the plaintiff, who claims under the title-deed. Since, however, I hold it is clear on the authority of the 44 Mad. case that enfranchisement is a clear and unequivocal resumption by the Government of the land and a re-grant to whomsoever it pleases, it follows that, unless Government had at the time of the resumption no right to resume, the first defendant has no case. If the rulings relied on by him, *Neelachalam* v. *Kamaraju* (6) and *Kotirajudu* v. *Venkataratnam* (7) imply the contrary, they must be taken to have been overruled by the 44 M. case, which was pronounced in 1921. The case of *Majanath Ali* v. *Mujafar Ali* (8) is a case of a khaji inam, to which the 44 Mad. case has no application and is not in point here. Different considerations, as pointed out in that case, apply to the cases of personal inams.

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1. (1903) 13 M L J 438. 7. (1919) 38 M L J 320. 8. (1923) 45 M L J 791.

Another point might have been taken, namely, that, as the first defendant is one of the grantees, presumably he was an office-holder prior to the grant and therefore was holding not adversely to the office-holder but on his or their behalf. But, as there is no evidence as to who actually was the holder at the time of the grant and as the case can be disposed of on the lines indicated above without going into that question, I need not consider it any further. Gourikantam v. Ramamurthy

I hold, therefore, that the finding of the lower appellate Court is correct. The Second Appeal is therefore dismissed with costs.

C. A. S. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

R. Viswanatha Pillai *Petitioner* (1st counter petitioner)*

v.

T. K. Periaswami Pillai *Respondents (Petitioner and Counter-petitioner Nos. 2 to 6).*

Madras Act V of 1920—Election—Validity—Ballot paper—Initials of polling officer placed on face of—Effect—Serial number printed on face of ballot paper—Effect—Election Rules 14 (1), 17 (1)—*Rule requiring marking of serial number on back of ballot paper—Validity.* Viswanatha Pillai v. Periaswami Pillai.

The placing by the polling officer of his initials on the face of the ballot papers does not *per se* contravene R. 14 (1) of the Election Rules framed under Madras Act V of 1920, and does not in itself invalidate the votes. The placing of such initials does not in any way facilitate the identification of the particular voter and consequently, the provisions of R. 17 (1) are not infringed thereby.

The serial number printed on the ballot paper is not a mark by which the voter may be identified within the meaning of R. 17 (1) ; and the fact that the serial number appearing in the counterfoil of the ballot papers was printed not only on the back of the ballot paper itself but also upon its face does not invalidate the election.

It must be only from the mark itself that the means of identification must be obtained.

The Rule providing for the making of the serial number on the back of the ballot paper is not *ultra vires* of the Government.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the District Court of Trichinopoly, dated 8th November 1923 in Original Petition No. 126 of 1923.

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*C R P No. 1073 of 1923. 18th, 22nd January and 5th February, 1924.

Viswanatha Pillai v. Periaswami Pillai.

T. R. Ramachandra Aiyar and *S. R. Dikshit* for petitioner.

K. Rajah Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This petition relates to an election held in the Trichinopoly Municipality, and the only question for consideration is whether certain ballot papers that were then recorded are valid or not. These ballot papers are objected to on the ground that they infringe Rule 17 (1) of the Rules for the conduct of Elections of Municipal Councillors. That Rule is as follows " Any ballot paper which is not duly marked, or on which votes are given to more candidates than there are members to be elected, or on which any mark is made by which the voters may afterwards be identified, shall be invalid. " In the present case the contention before the District Judge of Trichinopoly was that these votes were invalid, because the polling officer had initialed the ballot papers not only on the back as directed in R. 14 (1) but had also placed his initials on the face. This placing of initials on the face does not *per se* contravene R. 14 (1) and we agree with the District Judge that in itself it cannot invalidate the votes and we also agree with the District Judge that the placing of these initials does not in any way facilitate the identification of the particular voter and, consequently, the provisions of R, 17 (1) have not been infringed thereby.

In this Court a fresh objection is taken to these ballot papers on the ground that the serial number which appears in the counterfoil of the ballot papers has been printed not only on the back of the ballot paper itself but also upon its face, although the form prescribed under the Rules distinctly states that the numbers shall be printed only upon the back. It is argued that this number is a mark by means of which the voter may be identified. The rules, however, prescribe that all ballot papers shall have this number upon the back and there is no doubt that, when the ballot paper is handed to the voter, a candidate or his agent may very easily see this number and make a record of it. Similarly as there is no provision that the backs of the ballot papers shall not be seen during the counting, it would appear that, if the candidate had recorded these numbers with the voter's name against each, it would be possible to identify the voter of any particular ballot paper. The putting of this number on the face would render such a process easier still ; but it must be remembered that, although the Rules are framed with a view to obtain secrecy of voting, it

Viswanatha Pillai v. Periaswami Pillai.

is impossible to defeat all attempts which may be made to violate that secrecy, and probably no Rules could be framed which could defeat every deliberate attempt made by a candidate's agent to violate secrecy. It is suggested that even the number on the back of the ballot paper is liable to violate this secrecy, but it is also essential that the ballot paper shall bear some mark on the back for purposes of identification, for, otherwise, there will be no means of preventing false ballot papers being inserted into the box. If it is once conceded that this number on the back is essential, we do not think that the addition of that number on the face would make any difference, unless it were proved that a list of names with the corresponding serial numbers had been prepared and that the voters could, therefore, be identified. No doubt in this case such a list might have been prepared and the voters identified thereby, but it has been laid down in *Woodward* v. *Sarsons* (1) that the identification must be made by seeing the paper itself or by reference to other available facts. Here the inspection of the paper would not reveal the voter's identity and, if there is no list such as mentioned above available for reference, the identity could not be discovered. We think, therefore, that this number is not a mark by which the voter may be identified within the meaning of R. 17 (1) and in this connection reference may also be made to the Judgment of Field, J. in 4 O Malley and Hardcastle, page 34 in which he follows *Woodward* v. *Sarsons* (1) and says that it must be only from the mark itself that the means of identification must be obtained. We would, however, point out that the printing of the number on the face of the ballot paper is not authorised under the Rules and should not be repeated in future elections.

A further contention is raised that the Rule providing for the marking of the serial number on the back of the ballot paper is *ultra vires* because it is not conducive to the secrecy of the ballot for which purpose the Rules were framed. As remarked above, it is impossible to obtain absolute secrecy if persons are deliberately scheming to violate it. The Rule is a reasonable one made for the identification of ballot papers and for the prevention of insertion of false papers and, consequently, we cannot say that it is in any way *ultra vires* of the Government.

In the result, the petition is dismissed with costs.

A. S. V. *Petition dismissed.*

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1. 10 C P D 733.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE PHILLIPS AND MR. JUSTICE ODGERS.

A. Sethurama Mudaliar *Petitioner** (*Respondent*)

v.

M. P. Mangala Goundar *Respondent* (*Petitioner*).

Sethurama Mudaliar v. Mangala Goundar

Madras Act V of 1920, R. 17 (1), S. 9 (1)—Ballot papers given to voters with serial number and voters' own number on electoral roll inserted on back—Validity of election—Effect on—Election decalred void—Effect—New election—Retiring councillor if deemed to have been re-elected.

At a municipal election, the polling officer, when giving out the ballot papers to the voters, put not only the serial number on the back of them but also the voters' own number on the electoral roll, with the result that anyone seeing this number on a voting paper could, by a reference to the electoral roll which was available to everybody, identify the particular voter. As a matter of fact, the numbers were not particularly noticed at the time of the election in question, and the voters were not identified thereby.

Held, that the votes were invalid under R. 17 (1) of the Election Rules framed under Madras Act V of 1920, and that, as all the votes cast at the election were invalid, no proper election had been held and that the candidate returned had not been properly elected.

Held further that the effect of the election being declared void was that a fresh election should be held and not that the retiring concillor should be deemed to have been re-elected.

Rule 17 (1) of the Election Rules does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark.

S. 9 (1) of Madras Act V of 1920 is not meant to apply to cases where an election has been held and is subsequently declared void.

Petition under S. 115 of Act V of 1908 and S. 107 of the Government of India Act, praying the High Court to revise the order of the Court of the Subordinate Judge of Dindigul, dated 3rd December, 1923 in O. P. No. 30 of 1923.

S. Muthiah Mudaliar, K. S. Ganapathi Aiyar and *Watrap Subramania Aiyar* for petitioner.

K. V. Krishnaswami Aiyar and *N. Swaminatha Aiyar* for respondent.

The Court delivered the following

JUDGMENT :—In this petition the Subordinate Judge of Dindigul has found that the ballot papers at a Municipal election held in Palani Municipality are invalid under R. 17 (1) of the Election Rules. The polling officer, when giving out the ballot papers to the voters, put not only the serial number upon the back of them but also the voters' own number on

* C R P No. 1072 of 1923. 5th February, 1924.

electoral roll. Consequently, anyone seeing this number on a voting paper could, by a reference to the electoral roll which is available to everybody, identify the particular voter ; and it has been held in *Woodward* v. *Sarsons* (1) in an almost identical case, that the ballot papers were invalid ; but in that case the electoral numbers were placed, not upon the back, but upon the face of the ballot paper. It is now argued that this makes a great deal of difference, because the back and the front of the paper cannot be seen at the same time. In Madras there is no rule like the English rule enjoining on the Returning Officer the necessity of keeping the ballot papers face upwards as far as possible, and it is not suggested that the backs of the ballot papers would not be visible when taken out of the box. R. 17 (1) merely says that the paper is invalidated by any mark put upon it by which the voter may be afterwards identified. Considering the possibility and even the probability of the back of the voting paper being visible to the candidate or his agent, the fact that the electoral number is on the paper would afford a ready means of identification, and it is I think such a mark as is contemplated in R. 17 (1). No doubt, at the present election these numbers were not particularly noticed at the time of the election and, as a matter of fact, the voters were not identified thereby but the Rule does not require that the identification shall be made but merely that there is a possibility of such identification by reason of the mark. In fact, in the case already referred to, *Woodward* v. *Sarsons* (1), the Court observed that in the case before it the numbers had not been identified ; but as they could have been seen by the persons present at the counting of the ballot papers, it was held that the rule, which is similar in England to that in Madras, had been violated and the votes were invalid. It is argued for the petitioner that the decision in *Wood ward* v. *Sarsons* (1) cannot be applied to India, because under R. 17 (1), the mark by which identification may be had must be placed on the voting paper by the voter himself. Apparently the first part of the Rule does apply to marks put by the voter, but there is nothing in the latter part to show that it is the voter himself who must put the mark by which he may be identified ; and in the absence of words restricting the meaning of the Rule, I see no reason why the view held in *Woodward* v. *Sarsons* with reference to similar rule should not equally apply to R. 17 (1). There is no restriction in

(1) 10 C. P D. 733.

Sethurama Mudaliar v. Mangala Goundar

the words of the rule and, consequently, no restriction could be read into it without adequate reason. It follows, therefore, that these votes are invalid under R. 17 (1) and inasmuch as all the votes cast at the election are invalid, no proper election has been held and the petitioner has not been properly elected.

It is then argued for the petitioner that under S. 9 (1) of the Madras Municipalities Act V of 1920, the petitioner who is the retiring councillor mu st be deemed to have been re-elected. That section reads as follows :—" If for any cause no councillor is elected at an ordinary election held under the previous section, the retiring councillor shall, if willing to serve, be deemd to have been re-elected. " The argumnt is that, as all the votes cast were invalid, there has been no election of a councillor and that, consequently, the provisions of S. 9 (1) apply. On the other hand, it is contended for the respondent that this section is only applicable to cases in which an election is held but no candidates are nominated for election or no voters vote for any of the candidates. The petitioner's contention has the support of the case, *In the matter of the Specific Relief Act and In the matters of Sarafally Mamooji and Jaffer Jushib* (2), where Macleod, J., read a similar section in the Bombay Municipal Act as being applicable in the case of an invalid election. The point is not at all discussed in Macleod, J.'s Judgment and it does not appear whether there are rules framed in Bombay similar to those framed in Madras for the decision of disputes as to the validity of an election. From the Madras rules framed for this purpose it is quite clear that S. 9 (1) is not meant to apply to cases where an election has been held and is subsequently declared void, for R. 12 states that the Judge, on declaring an election void, must proceed to declare some other party to the petition to have been duly elected, or must order a fresh election. It is suggested that the first portion of this Rule declaring any other party to the petition to be duly elected applies to the case of the retiring councillor who would generally be made a party. It does not follow, however, that a retiring councillor would necessarily be a party and I do not think that it is the intention of this Rule. If the section applied to all cases of invalid elections, there is no reason why it should not say so in terms but it purports to apply only to the case where no councillor is elected. When an election has been duly held and votes have been cast and a

2. (1910) I L R 34 Bom 659.

Sethurama Mudaliar v. Mangala Goundar

councillor has been declared duly elected, can it be said, when that election is declared void, that no councillor has been elected? I think not, for the councillor undoubtedly was elected and would remain in office as a councillor provided that no petition objecting to such election was put in. In this view, S. 9 (1) is not applicable to the present case and, consequently, a fresh election must be held and this petition dismissed with costs (two sets).

Odgers, J :—I agree and have nothing to add.

A. S V. *Petition dismissed.*

IN THE HIGH COUT OF JURISDICTION AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, *Officiating Chief Justice*, AND MR. JUSTICE KUMARASWAMI SASTRI.

Bathai Baluswami Iyer and another *Appellants* (Defendants 6 and 7)*

v.

Chetty V. Krishnaswami Iyer and others *Respondents (Plaintiff and Defendants 1 to 5).*

Baluswami Iyer v. Krishnaswami Iyer

Transfer of Property Act, S. 83.—Deposit under—Validity—Effect—Death of mortgagee—Dispute as to who is legal representative—Deposit in case of.

On receiving a petition under S. 83 of the Transfer of Property Act it is the statutory duty of the Court to give notice to the mortgagee, and it is the mortgagee's duty upon receiving such notice to state the amount due on the mortgage and his willingness to accept the money deposited in full discharge of that mortgage and to deposit the mortgage deed in Court and receive the money. The expression "mortgagee" in S. 83 includes the legal representatives of the mortgagee, and where there are disputes among the heirs of the mortgagee and money is deposited in Court but the money not drawn out owing to those disputes, interest will cease to run from the date of the deposit.

On the death of a simple mortgagee there was a dispute between his widow and his adopted son as to who was entitled to his estate. Each gave notice to the mortgagor not to pay interest to the other claimant The appellants, who were the purchasers of the equity of redemption, paid the money due up to date into Court under S. 83 of the Transfer of Property Act. The petition prayed for the issue of notice to the widow and the adopted son of the mortgagee, for cancellation of the hypothecation deed and the return of the title deeds, and for a direction that they should take the amount due from the amount deposited in Court and pay the petitioner's costs. In the body of the petition there was a statement that it was just that an order should be passed directing either the two counter-petitioners or anybody who might be entitled, to receive the whole of the said amount or the amount that might be found due, The widow and the adopted son each asked for

* Appeal No. 39 of 1923 28th January 1924.

Baluswami Iyer v. Krishnaswami Iyer

the payment of the whole amount to the exclusion of the other; but neither stated what amount was due at that time or questioned the sufficiency of the amount deposited. In a suit for sale on foot of the mortgage instituted by the adopted son who was ultimatey found to be entitled to the estate, *held* that the deposit under S. 83 was a proper deposit and that interest ceased to run from the date thereof.

Appeal against the decree of the Court of the 2nd Additional Subordinate Judge of Madura in O. S. No. 84 of 1922.

C. V. Ananthakrishna Iyer and *R. Srinivasa Iyengar* for appellant.

C, Krishnamachari for respondent.

The Judgment of the Court was delivered by

The Officiating Chief Justice :—This is a suit for sale of mortgaged property brought upon a hypothecation bond dated the 6th of December 1917. The interest was at 9 per cent. per annum, and in default of payment in regular monthly instalments it was to be at 15 per cent. Interest was regularly paid until the mortgagee died on the 30th of July 1918. Upon his death, there was a dispute between the widow and his adopted son as to which was entitled to his estate. Each gave notice (Exs. VIII and IX) to the mortgagor not to pay interest to the other claimant. The appellants, who are purchasers of the equity of redemption, paid the money due up to date on the 15th of January, 1920, into Court under S. 83 of the Transfer of Property Act. There was a suit by a stranger against the widow and the adopted son, O. S. No. 49 of 1921, which was compromised by the widow admitting the right of the adopted son. The Subordinate Judge has given the latter, who is the plaintiff in this suit, a preliminary decree for sale of the hypothecation in default of payment of the amount claimed including interest and costs within two weeks from the decree.

The Subordinate Judge has held that the deposit made by the appellants was not a proper deposit under S. 83, because it was conditional. He says that the appellants when depositing the amount into Court, requested the Court to decide which of the two counter-petitioners was entitled to receive the amount and also to decide whether the higher rate of interest was payable or not, and further to fix the amount of compensation due for breach of contract in case the higher rate of interest was considered to be penal. We have perused the petition put in by the appellants, which is Ex. I. The prayer portion of this petition merely asks for the issue of notice to the counter-petitioners, for cancellation of the hypothecation

Baluswami Iyer v. Krishnaswami Iyer

deed and the return of the title deeds, and for the direction that they should take the amount due from the amount deposited in Court and pay the petitioner's costs. There is no request that the Court should decide whether the higher rate of interest was payable or not and should fix the amount of compensation payable, as the Subordinate Judge surmises. In the body of the petition there is a statement that it is just that an order should be passed directing either the two counter-petitioners or anybody who may be entitled, to receive the whole of the said amount or the amount that may be found due. The Court refused to pass an order upon this petition on the ground that the counter-petitioners were disputing each other's title to receive the mortgage money, not on the ground that the amount due had not been determined. Neither the widow nor the adopted son in their replies to the petition raised any objection as to the correctness of the amount, deposited. The 2nd counter-petitioner, who is the plaintiff in this suit, stated that he was advised that he was entitled to a larger amount, but he did not say what amount was actually due to him. The other counter-petitioner said that she was not able to say whether the amounts deposited into Court were the correct amounts because the 2nd counter-petitioner had taken away the bond. The present plaintiff expressed his willingness to receive the amount deposited if it was paid to him unconditionally and said that if that was done he would waive all other objections. The other counter-petitioner similarly asked for the whole amount to be paid to her. There was no prayer on the part of either the petitioner or the counter-petitioner for a regular enquiry as to the exact amount due. On receiving a petition under S. 83 it was the statutory duty of the Court to give notice to the mortgagee, and it was the mortgagee's duty upon receiving such notice to state the amount due on the mortgage and his willingness to accept the money deposited in full discharge of that mortgage and to deposit the mortgage-deed in Court and receive the money. The Court's reason for refusing to pass orders upon this petition was clearly wrong. It has been decided in *Subba Rao* v. *Paddiammal Nadathi* (1) that the expression "mortgagee" in S. 83 of the Transfer of Property Act includes the legal representatives of the mortgagee and that a deposit by the mortgagor of the mortgage money is payable to the legal representative as a legal deposit; and in *Nagathal* v. *Arumugham Pillai* 2

1. (1923) 46 M. L. J. 74. 2. (1923) 44 M. L. J. 362,

Baluswami Iyer v. Krishna swami Iyer

it has been held that, where there are disputes among the heirs of the mortgagee and money is deposited in Court but the money not drawn out owing to those disputes, interest will cease to run from the date of the deposit. In *Ramsumran* v *Schibzada Bijai Pratab Narain Singh*[1] where there was a dispute as to the succession to the estate of the mortgagee and the mortgagor deposited the money in Court on account of the persons so claiming, it was held that he had complied with the requirements of S. 83. The Subordinate Judge was, therefore, in error in treating the deposit as having been conditional, on account of the title of the legal representatives being undecided. It was no fault of the mortgagors that the succession to the mortgagee's estate was in dispute, and they cannot therefore be made to suffer in consequence.

As regards the rate of interest due, the 2nd counterpetitioner did not in his reply petition, as he should have done, state how much money was due at that time nor did he question the sufficiency of the amount deposited. He therefore, cannot now be heard to argue that the deposit was invalid because the rate of interest was undecided. The depositors were willing that he should take the whole of the amount deposited if the principal and interest came to that amount ; and it is not now suggested that anything more was due. The Subordinate Judge has further held that the deposit was not a proper one because interest was not calculated for the date of the deposit, 16-1-1920, but interest was deposited for the 5th of July 1918 treating that as the first date of the default. The hypothecation deed being dated the 6th of December 1917, there could be no default before the 6th of July and, therefore, if interest for one day, namely, the date of the deposit was in defect, it was made up by the amount deposited for the 5th of July 1918, when nothing was due for that date.

It is not necessary to decide the further question which has been raised before us, that is, whether the Subordinate Judge was right in ordering penal interest to be paid from the date of the default or whether the Court should allow a reasonable rate of compensation.

Holding that the deposit made by the appellants was a proper deposit, we must allow the appeal and modify the decree

1. (1885, 5 A. W. N. 347.

by disallowing interest from the date of the deposit in court 16-1-1920. The respondents must pay the costs of the appellants in this court. Each party will bear his own costs in the lower court.

A. S. V. *Appeal allowed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS

PRESENT:—MR. JUSTICE WALLACE.

Aiyisa Bivi Ammal *Appellant* (Plaintiff.)*

v

Kalandarsa Rowther and another *Respondents (Defts, 1 and 3.)*

Aiyisa Bivi Ammal v. Kalandarsa Rowther.

Adverse possession—Mortgage void—Mortgagee in possession under—Sale void in favour of—Possession held under, for 12 years—Effect—Rights of parties

1st defendant was admitted into possession of immoveable property in 1893 under a mortgage executed by a person who was not the guardian of the plaintiffs, then minors, i.e., under a void mortgage. While the 1st defendant was so in possession, the same person acting on behalf of the plaintiffs sold the property to the 1st defendant in 1900. This sale was, like the mortgage, void.

Held, that the effect of the sale was to alter the nature of the possession which 1st defendant had in the property, *viz.*, from that of a mortgagee to that of an absolute owner, and that after 12 years from 1900 1st defendant acquired absolute ownership by adverse possession.

Second Appeal against the decree (on remand) of the Court of the Subordinate Judge of Mayavaram in Appeal Suit No. 29 of 1917, preferred against the decree of the Court of the District Munsif of Mayavaram in Original Suit No. 316 of 1916.

V. Narasimha Iyengar for appellant.

K. Sankara Sastri for respondent.

The Court delivered the following

JUDGMENT:—The ruling in *Imamband*i v. *Mutsaddi* [1] which was relied on by this Court in its judgment of 10—2—1920 for holding that the sale Exhibt III is not binding on the plaintiff is equally in point to hold that the mortgage Exhibit I is not binding on the defendants. Both transfers being by a person not guardian of the minors, are equally void.

So that the position is this: 1st defendant was admitted into possession in 1893 under a void mortgage. The nature of his possession after that was nevertheless that of mortgagee and not absolute trespasser—see *Gopala Dasu* v *Rami* [2] and he began then to prescribe by adverse possession for

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* S, A No 18 of 1921. 17th January 1924.

1. (1918) I. L. R. 45 Cal. 878, 35 M. L. J. 422 (P. C)
2. (1921) I L. R 44 M. 916

Aiyisa Bivi Ammal v. Kalandarsa Rowther.

the legal status of mortgagee which, if his possession was not altered or disturbed, he would acquire, after twelve years of such possession, *i. e.*, the plaintiff would after such a period of 12 years be barred by limitation from contending on the ground that the mortgage was a void one, that 1st defendant was not even mortgagee. But while the 1st defendant was thus prescribing for a legal mortgage title, the same mortgagor on behalf of the plaintiffs, chose to sell the property to him in 1900 under Exhibit III. This sale no doubt was equally void as the mortgage was. But it had the legal effect of altering the nature of the possession which 1st defendant had in the property. He began in 1900 to prescribe by adverse possession for a vendee's title, just as in 1893 he had begun to prescribe for a mortgagee's title, and that the manner of his possession was prescribing for full ownership was clearly known to the party who had deliberately converted the mortgage into a sale.

It seems to me, therefore, quite clear that after 12 years from 1900, 1st defendant had prescribed by adverse possession for a full vendee's title, *i. e*, absolute ownership, and that it is not open to plaintiff now to contend that the mortgage title emerges again when the sale is held void, and the defendants must therefore prescribe for 60 years. The plaintiff's guardian converted the possession of 1st defendant as mortgagee into that of vendee.

If it should be argued that the adverse possession as vendee vanishes when the sale is held void, it must in the circumstances of this case equally follow that the adverse possession as mortgagee vanishes when the mortgage is held void. The plaintiff would then be in a worse case, since then 1st defendant would have been an absolute trespasser since 1893, and the suit would be long barred by limitation.

The Lower Appellate Court's decision is correct and I dismiss this appeal with costs.

A. S. V. *Second Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN.

Abdul Jaffar Sahib and others — *Appellants** (*Defendants* 1 *to* 3).

v.

K. Venugopal Chettiar and others — *Respondents.* (*Plaintiffs, L. Rs.*)

Abdul Jaffar Sahib *v.* Venugopal Chettiar

Partnership—Dissolution of old partnership and formation of new one—Accounts of old Partnership--Right to take, on dissolution of new one--Condition—Limitation.

The plaintiff, the 2nd, 3rd, and 4th defendants, and the 1st defendant's father had a partnership in bamboo trade from 1912 to 1913. 1st defendant's father died in that year. Nevertheless the same bamboo trade was carried on by the surviving members along with the 1st defendant, and apparently the father's share was treated as the 1st defendant's share in the new partnership which continued till 1917. In 1918 plaintiff instituted a suit for dissolution of partnership, for the taking of accounts and for recovery of his share of the profits, the accounts which the plaintiff wanted to be taken being not only of the trade from 1913 to 1917 but also of the trade in 1912—1913

Held that the claim to take accounts of 1912—13 partnership was not barred by limitation.

No doubt, when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless if the remaining partners continue the business for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership.

Appeal against the decree of the Court of the Subordinate Judge of Vellore in Appeal Suit No. 196 of 1921 (A. S. No. 331 of 1920 on the file of the District Court of North Arcot) preferred against the decree of the Court of the District Munsif of Tiruvannamalai in O. S. 534 of 1918.

S. T. Srinivasagopala Chari for Appellant.

N. Swaminatha Iyer and *K. G. Srinivasa Iyer* for Respondents.

The Court delivred the following.

JUDGMENT :—In this case the plaintiff brought a suit for dissolution of partnership, for the taking of accounts and for recovery of money due to him as porofits. It would appear that the plaintiff, the 2nd, 3rd and 4th defendants and the 1st defendant's father had a partnership in bamboo trade from 1912 to. 1913. The 1st defendant's father died in that year and that of course in law amounted to a dissolution of the partnership. Nevertheless

* S. A. No. 788 of 1922. 7th January 1924

Abdul Jaffar Sahib v. Venugopal Chettiar

the same bamboo trade was carried on by the 2nd and 3rd defendants along with 1st defendant who was the son of the deceased man and plaintiff was also added as a partner. It is a question in this case whether the plaintiff came in as a partner or only as a sub-partner of defendants 1 and 3 alone. The Subordinate Judge has found that in taking the plaintiff into the firm of defendants 1 to 3, the defendants 1 and 3 who alone entered into the contract with the plaintiff under Ex. A really acted on behalf of the firm including the 2nd defendant, and I think I must accept that the finding as a finding of fact and hold that the plaintiff became not a sub-partener but a partner in the second partnership which continued till 1917. The plaintiff is now suing for the accounts to be taken not only of the trade from 1913 to 1917 but also of the trade in 1912- 1913. It is contended before me that the claim to take accounts of 1912-13 partnership is barred by limitation and those accounts should be excluded from the decree. No doubt when a partner dies, the partnership comes to an end under the Contract Act. But nevertheless as was held in the case in *Ahinsa Bibi* v *Abdul Kader Sahib* (1) if the remaining partners continue the business, for the purpose of ascertaining what shares those remaining partners brought into the new partnership an account may have to be taken of the old partnership and there will be no question of limitation at all in such a case as that, for the account of the old partnership is taken not for the purpose of enforcing the claim to the money due as profits in that partnership but for the purpose of ascertaining what the capital supplied by the continuing partners was to the new partnership. In that view there will be no question of limitation preventing the accounts of the old partnership being taken. I think that principle applies to this case. No doubt here one of the partners, 1st defendant in the second partnership, is a newly added partner. Nevertheless he was the son of his father who was the previous partner, and apparently the father's share was treated as the son's in the new partnership. The father's other heirs if any are now barred from claiming any share in the profits of 1912-13 trade and the 4th defendant also who went out from the partnership in 1913 will also be barred from claiming a share in the trade; but as between the various persons who are now members of the new partnership, there will be no bar of limitation for the purpose

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1. (1901) I L R. 25 M

Abdul Jaffar Sahib v. Venugopal Chettiar

of taking accounts of 1912-13 partnership. As regards the share itself of the plaintiff, the agreement under Ex. A was that he should be given a two-annas share in the rupee of the profits. It is contended by the learned Advocate for the appellants that it means a two-annas share only in the profits of defendants 1 and 3 and as they are getting only an eight-annas share, it means only one-anna share in the whole of the profits. I do not think that that contention is right, more especially as I find that the plaintiff became really a partner of the firm including the 2nd defendant and as it is clear that what was intended was that out of the total share of the profits the plaintiff should have a two annas fraction, and when accounts are taken and the profits are ascertained the plaintiff will be given that share as decreed by the lower Appellate Court.

It is also contended that there is no finding that the accounts of the previous partnership of 1912-13 was not taken and settled and therefore I should call for a finding on that point before I decide that the case in *Ahinsa Bibi* v. *Abdul Kadir Saheb*(1) quoted above applies. I do not think that that is correct, for the Subordinate Judge says expressly in paragraph 3 of his judgment that the plaintiff alleges in his plaint a continuance of the same business and that he and his witnesses prove that plaintiff's accounts of such business were not settled. That, I think, is a clear finding on the point, and it will be erroneous to call for a fresh finding on a point like that. All the points taken in Second Appeal failing, the Second Appeal fails and is dismissed with costs.

A. S. V. —— *Second appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. CHARLES GORDON SPENCER, OFFICIATING CHIEF JUSTICE, AND MR. JUSTICE DEVADOSS.

Best & Co., Ltd., Agents of the Nobel's Explosives Co., Ltd, *Appellant**

v.

The Corporation of Madras *Respondent*

Best & Co., Ltd., v. The Corporation of Madras.

Madras City Municipal Act (IV of 1919) S. 110 *and Sch. IV R. 7 Proviso "Gross income received in or from the City" of Madras—Meaning of.*

The expression "gross income received in or from the city" in the proviso to Rule 7 of Sch. IV of the Madras City Municipal Act does not include income arising out of business transacted outside Madras, the proceeds whereof are transmitted to and received by the agents of the incorporated company in Madras. *Smidth & Co* v *Greenwood* (1921) 3 K. B. 583 ; *Board of Revenue* v *Madras*

* Ref. Cas. No. 1 of 1923. 17th & 18th January and 7th February 1924

(1) (1901) I. L. R. 25 Mad. 26.

Best & Co., Ltd., v. The Corporation of Madras.

Export Co (1923) 46 M. 360, 44 M.L.J. 290 *Board of Revenue* v. *Ripon Press* (1923) 44 M. L. J. 523; *Municipal Council of Cocanada* v. *The Clan Line Steamers, Ltd.* (1918) I. L. R. 42 M. 455 Referred to.

"Gross income" means the difference between the price at which the goods are sold and the cost price of the goods at Madras without making allowance for commission, cost of establishment and other charges.

Case stated under R. 17 of Schedule IV of the Madras City Municipal Act in M. T. Appeal No. 4 of 1922 on the file of the Court of Small Causes.

The case came on for hearing before the Division Bench after the expression of the opinion of the Full Bench—For a report of it see 46 M. L. J. 217.

R. N. Aingar and *O. T. Govindan Nambiar, instructed by Messrs King and Patridge,* for the Appellant.

P. Doraiswami Ayyangar for the Respondent.

The Court delivered the following

Spencer, O. C. J.

JUDGMENT—OFFICIATIG CHIEF JUSTICE.—The Full Bench having decided that an English incorporated company is not exempt from the tax on companies imposed by S. 110 of the Madras City Municipal Act IV of 1919 by the mere reason of its capital being expressed in sterling, we have now to determine the third question referred to us, which is whether income derived from the transaction of business outside the City of Madras which is transmitted to Madras to the agents of an English firm for being converted into sterling and remitted to England is part of the gross income of the company upon which the tax is leviable. The same question was raised once before in the *Sun Life Assurance Company* v. *The Corporation of Madras* (1) but was left undecided.

The proviso to rule 7 of schedule IV, Part II of the Act provides a scale for assessing the gross income of Companies the head office or a branch or principal office of which is not in the City, and whose gross income "received in or from the City" has not in the preceding year exceeded 25,000 rupees.

The answer to the question referred to us depends on the meaning to be attached to the words "gross income received in or from the City."

Mr. Aingar contended that the sales of explosives on behalf of Nobel's Explosives Company, Limited, at Saidapuram and Bangalore, were not received by Messrs. Best & Co., Ltd., as income when they were sent to Madras for being remitted to the Head office in England.

1. (1922) I. L. R., 46 Mad., 10; 42 M. L. J, 283.

In *The Secretary, Board of Revenue* v. *Ripon Press.* (1) COUTTS TROTTER, J., observed that a person could not receive the same sum of money *qua* income twice over. In *Sundar Das* v. *Collector of Gujarat*,(2) Sir SHADI LAL, C. J., was of opinion that a person could not receive a thing from himself and therefore a contractor who earned money in Baluchistan and brought it with him into the Punjab was not liable to be assessed to income-tax on it. That case was decided upon the language of the Income-tax Act (VII of 1918), and the decision might have been different if the same question of liability of an individual to pay income-tax on income earned outside and brought into British India had come up for determination under the Income-tax Act of 1922, which provides in S. 4 for taxing the profits and gains of a business arising outside British India and received or " brought in " within three years of the end of the year in which they arose.

In *Narasammal* v. *The Secretary of State for India*(3) I held that an individual, who resided in British India and received there instalments of an annuity payable in Mysore and remitted to her by an agent, was liable to be assessed to income-tax on those sums which were "received in British India" On the same line of reasoning it might be argued that income received in the City of Madras from an agent stationed outside must come within the words "income received in or from the city," as it is received in the City, if not from the City.

But it must be remembered that we are not now considering the liability of an individual to pay income-tax on his total assessable income whether derived from a British Indian source or received by a resident in British India, but we are interpreting a local Act which authorizes a particular Municipality or Corportation to levy a tax upon business transacted within the City for profit by incorporated companies.

The income of a trade or business arises or accrues in the place where its contracts are made or its goods are sold. This is made clear from *Smith & Co*, v. *Greenwood* (4.) The question whether the profits sought to be assessed were profits arising from any trade exercised within the United Kingdom of Great Britain was there answered by finding out where the operations

1. (1923) 44 M. L. J., 523.
2. (1922) I. L. R, 3 Lah 349.
3. (1915) I, L. R., 39 Mad., 885.
4, (1921) 3 K B, D, 583

Best & Co., Ltd, v. The Corporation of Madras.

Spencer, O. C. J.

took place from which the profits in substance arose. Again in *Municipal Council of Cocanada* v. *The Clan Line Steamers, Ltd.*, (5) the trade of a shipping company was held to be exercised and its business carried on in the place where its freight earning contracts were entered into.

Following the principle of these decisions, there can be no doubt that Nobel's Limited, are not transacting business within the City of Madras in respect of the sales of explosives which take place at the magazines in Bangalore in Mysore State and at Saidapuram in Nellore District. The fact that Nobel's, Limited, employ Messrs. Best & Co., Ltd., as agents in Madras for the purpose of collecting the profits made at Saidapuram and Bangalore and of remitting them to England is not a circumstance from which it can be deemed that Nobel's Limited transact business in Madras City, as explained in the explanation to S. 110, even though accounts of the transactions are kept in Madras and though Messrs. Best deduct their commission for acting as agents for the English company. The mere fact that the money for which the goods are sold passes through Madras on its way to England will not involve any liability to pay the Municipal tax on companies in Madras, because in converting the profits into English money and obtaining bills of exchange on England Messrs. Best & Co. are doing no more than what might be done through any broker or Bank.

By the expression "gross income" I understand to be meant the total sum by which the sale price of all goods sold exceeds their cost price at the place of sale when that sum is received.

Devadoss, J

Davadoss, J.—Of the three questions referred for the opinion of the High Court by the Chief Judge, Small Cause Court, the first question has been answered and the second follows the opinion on the first. The third question is "what is the meaning of the expressions 'gross income' and 'gross income received in or from the City' in the proviso to rule 7 ? Does the latter expression include income arising out of business transacted outside Madras the proceeds whereof are transmitted and received by the agents of the incorporated company in Madras where they have their head office ?" The answer to this depends upon the construction of S. 110 and Rule 7 of schedule 4 of the Madras City Municipal Act IV of

5. (1918) I. L. R. 42 Mad. 455 : 36 M. L. J. 226.

1919. The section makes "every incorporated company transacting business within the city for profit or as a benefit society" liable for the tax. The explanation to it makes such company liable if it has an office, agent or firm to represent it for the purpose of transacting business in the city. There is no difficulty in construing S. 110. All that is required under S. 110 is that the company should be an incorporated company and that it should transact business within the city for profit or as a benefit society, and by the explanation it is sufficient if it has an office, agent or firm to represent it for the purpose of transacting business in the city. Schedule 4, rule 7 is also clear, but the difficulty arises in construing the words "its gross income received in or from the city."

The Nobel's Explosives Company, Limited, is an English Company which carries on business through its agents Messrs. Best & Co., Madras. It has three magazines, one at Madras, one at Saidapuram and one at Bangalore. Messrs. Best & Co. are remunerated by commission on the sales in the three places and are paid Rs. 300 a month for watching and other charges incurred in the three places. The Corporation of Madras assessed the Nobel's Explosives Company, Limited, on the basis of the gross income from the three places and the latter objected to the assessment. Hence the reference.

It is contended on behalf of the Nobel's Explosives Company, Limited, that, in computing the gross income, the amounts realised by sales at Saidapuram and Bangalore should not be taken into account. The argument is (1) the income was derived from sales outside the city; (2) the contract of sales was not made in the city; (3) the sale-proceeds were received at Saidapuram and Bangalore and (4) Messrs. Best & Co. received the sale-proceeds from the two places only for transmission to their principals. It is argued on behalf of the Corporation that the agents of the Nobel's Explosives Co., Ltd., namely Messrs. Best & Co. are in Madras. (2) The sale-proceeds are received in Madras (3) the accounts are kept in Madras and credits and debits are made in the Madras account (4) the salesmen at Saidapuram and Bangalore are not independent agents of the Nobel's Explosives Limited, but are only the servants of Messrs. Best & Co. and that under the proviso to rule 7 and schedule 4, the income should be considered to

have been received in the city, if not from the city, and therefore the Standing Committe of the Corporation was right in assessing the company on the basis of the gross income from the three places.

That the company is liable to taxation is not disputed. The company has an agent in the city and it transacts business in the city. Therefore the conditions required by S. 110 are fulfilled. Schedule 4, rule 7 gives the basis of taxation or the rates at which the companies are to be taxed. If a company has the head office or a branch or principal office in the city, it is assessed on the basis of capital alone, but if it has not the head office or a branch or principal office in the city it is assessed on the basis of the gross income received in or from the city. The Nobel's Explosives Company, Limited, not having the head office or a branch or principal office in the city, comes within the proviso to rule 7 of schedule 4. It is contended by Mr. R. N. Aingar for the Nobel's Explosives Company Limited, that the words "received in or from the city" mean the same thing. I do not think that the words "received in or from the city" mean the same thing. To give an example, if goods are sent by V. P. P. to mufassal, the value of the goods is received in the city; but where the sales are effected locally, the sale-proceeds are received from the city. A contract for the supply of goods may be made in the city and the price of the goods may be paid here but delivery may be made outside. In such a case the expression "received in the city" would apply to the income which is paid to the agent who is in the city though the amount is sent in from outside the city. But the necessary condition for assessment is that the business must be done in the city. It matters not whether the sale-proceeds are received from the city or received here from outside. The expression "received in" used in taxing statutes is a well-known one and is intended to reach the income received from outside. The tax that is leviable under S. 110 is not an income-tax but is a tax for a carrying on or transacting business, in the city and the question is therefore whether the income which is not derived from the transaction or business in the city is liable to taxation under S. 110 and rule 7 of schedule 4 of the Act. It is admitted that sales were effected at Saidapuram and Bangalore and deliveries of the goods were made at the two places and the sale-proceeds were

Best & Co., Ltd. v. The Corporation of Madras.

Devadoss, J.

also received in the two places. All that Messrs. Best & Co. have done was to receive the proceeds, enter them in the accounts, and give credit to their principals and remit the amount that remained after meeting the commission and other charges. The real question therefore is, whether that amounts to transacting business in the city in regard to the sales at Saidapuram and Bangalore. A number of cases have been quoted by Mr. R. N. Aingar who appears for the Nobel's Explosives Co., Limited, and by Mr. Duraiswami Ayyangar, who appears for the Corporation. Before considering the cases it is necessary to bear in mind the distinction between an Act like the Income-tax Act and a Local or Municipal Act like the Madras City Municipal Act. The object of the Income-tax Act is to tax all the income which a person makes or receives and it is worded so as to reach all the income it possibly can. But an Act which taxes a profession, calling or trade, carried on in any particular city or locality, does not attempt and cannot hope to attempt to bring within its scope professions, callings or trade exercised or carried on outside such city for locality. With these remarks I will consider the cases quoted by both sides

In *F. L. Smidth & Company* v. *Greenwood* [1] the facts were :— A Danish firm had an agent in London for advising prospective purchasers and taking samples of earth and sending to Copenhagen, etc. Contracts were finally concluded in Copenhagen. The goods were delivered F. O. B. The Commissioners of Income-tax held that the firm exercised a trade within the United Kingdom and was assessable to Income-tax. ROWLATT, J., held that the firm was not assessable to Income-tax as it did not carry on any trade within the United Kingdom. The Court of appeal affirmed the decision of ROWLATT, J. Lord STERNDALE, M. R. observes with regard to the contention, that the firm exercised trade within the united Kingdom :— "Such help as was given here in the negotiation of contracts and their execution by Mr. Robinson is not enough to justify a finding that the respondents exercised a trade within the United Kingdom within the meaning of the Income-tax Act." ATKIN, L. J., observes that canvassing for orders and supervising the successful adapting of the goods bought for the purpose of buyer's business do not amount to an exercise of trade.

1. (1921) 3 K. B. 583.

Best & Co., Ltd. v. The Corporation of Madras.

Devadoss, J.

In *the Board of Revenue* v. *The Madras Export Company*,(1) the learned Chief Justice and WALLACE, J., held that in the case of a firm in Paris which purchased goods and sold them in Paris, the profits accrued solely in France and the firm's income was not taxable in British India. A mufassal firm buying goods in Madras for sale in the mufassal was held not assessble under the old City Municipal Act—vide *Hajee Shaik Meera Rowther* v. *The President of the Corporation of Madras*(2) In the light of the above decisions, it cannot be sucessfully contended that the Nobel's Explosives Company, Limited, exercises a trade or transacts business in the City by the mere fact of its agents keeping an account of the amounts realized by the sales at Saidapuram and Bangalore.

The next question is whether the sale-proceeds which are received by Messrs. Best & Co. in the city are income received in or from the city. In construing these words considerable help is derived from the cases which have been decided under the Income-tax Act both here and in England. Mr. Aingar urges that the income is made at the place where the sales are effected. The income or profits being the difference between the cost price and the sale price, the income is derived at the place where the sales take place and the income or profits made at places outside the city cannot be income received in the city by the fact of its being forwarded to Messrs. Best & Co. for transmission to England. In support of his contention he relies upon *Sundar Das* v. *Collector of Gujarat*(3). The Full Bench of the Lahore High Court held that the income which accrued due and which was received in Baluchistan and which was subsequently brought into British India was not assessable under the Income-tax Act of 1918. The Learned Chief Justice held that what was received once in Baluchistan cannot be received again in British India. In that case a considerable sum of money which was probably the savings of several years was brought into British India. There is nothing to show that the amount was the income of any particular year. If a person makes a fortune in a foreign country and returns to India, his fortune is not assessable, for it cannot be said to be the income of any particular year, but it may be the savings of a life time. Section 4, clause (2) of the Act of 1922, makes the

1. (1922) I. L. R 46 Mad. 360. 2. (1909) I L. R 33 Mad 82.
3. (1922) 3 Lahore 349.

Best & Co., Ltd. v. The Corporation of Madras

Devadoss, J.

income made outside British India assessable to income-tax provided such income is brought into British India within three years of its receipt. The decision in *Sunder Das* v. *Collector of Guzarat* (1) was under Act VII of 1918 in which there was no provision corresponding to that contained in the second clause of section 4. In *The Secretary, Board of Revenue (Income-tax), Madras* v. *Ripon Press and Sugar Mills Company, Limited* (2) the facts were A company had its office in Bellary, but it carried on all its business in Raichur in the Nizams Dominions. The Company directed the management and distributed the dividends. Some money was received at Bellary for meeting the cost of the establishment there. The Full Bench held that the Company was not liable to assessment under the Income-tax Act. In that case it was found that the dividends were payable only from the treasury at Raichur which is outside British India. The Learned Chief Justice remarked that even with regard to the amounts received at Bellary, the firm was not assessable under the Income-tax Act in respect of such amounts. There are some observations in *Sun Life Assurance Company* v. *The Corporation of Madras* (3) which support the contention of Mr. Aingar, but the point was not expressly decided and it is unnecessary to refer to that case in detail. In *Municipal Council of Cocanada* v. *The 'Clan' Line Steamers, Limited,* (4) it was held that the 'Clan' Line Steamers, Limited, were not liable to pay profession tax under S. 53 of the District Municipalities Act because the freight earning contracts with the shippers were not entered into at the port of Cocanada. It was found in that case that the shipping contracts were made with Messrs. Gordon, Woodroffe & Co. at Madras, and not with the local agent Messrs. Ripley & Co., who forwarded the applications of such contracts to be dealt with by Messrs. Gorden, Woodroffe & Co. If the shipping contracts had been made at Cocanada, then the company would have been liable. It may be observed in passing that it was evidently in view of this decision that the words "whether or not such office, agent or firm has power to make binding contracts on behalf of the Company" were enacted in explanation to S. 110.

1. (1922) I. L. R. 3 Lah. 349 2. (1923) I.L.R 46 Mad 706 : 44 M.L J. 523.
3. (1922) I.L.R. 46 Mad. 10 : 42 M.L.J. 283.
4. (1918) I. L. R. 42 Mad. 455 35 M L.J. 226.

Best & Co., Ltd. v. The Corporation of Madras

Devadoss, J.

In this case if the contracts for sale were made with Messrs. Best & Co. in Madras, and goods were delivered at Saidapuram or any other place outside the city, the Company would be liable to pay tax under S. 110 of the Madras City Municipal Act. As I have already observed, it is not disputed that the contracts of sale were made at Saidapuram and Bangalore and the price of the goods sold was received there. Considering the object and scope of the proviso to rule 7 of schedule 4 of the Act, it would be doing violence to its language to hold that the income earned outside the City is income received in the City. The well known rules of construction that Taxing Statutes should be strictly construed and that no one is to be taxed except by express words should not be departed from in construing the City Municipal Act. The words of section 110 being quite clear that companies transacting business within the city are liable for the tax, it is opposed to the scheme of the Act and the wording of the section to tax a company for business transacted wholly outside the city. No doubt, if the company had the head office or a branch or principal office in the city, the question of the amount of income would not arise and it would be taxable on the basis of its capital. My answer is "the gross income received in or from the city" does not include the income arising or accruing from the business outside the city.

The expression "gross income" used in the proviso to rule 7 cannot be said to be "net income." The expression "net income" is used in rule 9. Rules 8 and 9 apply (1) to persons holding an appointment upon a monthly salary and (2) to persons exercising any profession, art, trade or calling or their agents or servants in their absence. Rule 7 applies to incorporated companies. The basis of assessment under rule 9 is the net income of the person liable to be assessed. The words "net income" in rule 9 must be held to mean income which a person gets after deducting legitimate charges and expenses from the gross income. Mr. Aingar contends that the expression "gross income" is a contradiction in terms and should be held to mean net income. The expression "gross profits" is defined in Cotter's Advanced Accounts as meaning excess of selling price over cost price. The expression "gross income" has the same meaning as the expression "gross profits." If gross income be held to mean net income it would not only

be imputing absurdity to the legislature, but would also be doing violence to plain English words. Reading the proviso to rule 7 carefully, it appears that the legislature advisedly used the expression "gross income," for, a company which has an agent and does immense business in the city may not earn any net income owing to losses in another part of the world, say South America or Australia. The object of section 110 is to assess the incorporated company which is transacting business in the city, and it is immaterial whether the business yields a net profit or not. Relief is given to such companies by the proviso to rule 7 in cases in which there is no head office or a branch or principal office in the city. Surely the Corporation of Madras cannot be asked to wait for the declaration of devidend by a foreign company to see whether the company is liable to pay a licence fee for carrying on or transacting business within the city. The words "gross income" mean the difference between the cost price and the sale price of the goods sold. If a company makes a very large income by the sale of goods in the city, it cannot escape taxation by saying that it has sustained loss in another place. I have no hesitation in holding that the expressions "gross profits" and "gross income" mean the difference between the price at which the goods are sold and the cost price of the goods at Madras without making allowance for commission and cost of establishment and other charges.

A. V. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE KRISHNAN AND MR. JUSTICE VENKATASUBBA RAO.

Veerasami Mudali *Appellant* (Plaintiff)*

v.

Palaniyappan and others *Respondent (Defendants).*

Verasami Mudali v. Palaniyappan

Service Inam—Claim of permanent occupancy by tenant—Burden of proof—Permanent lease of service inam lands—Validity of—C. P. Code, S 11—Suit in ejectment—Claim of permanent occupancy right negatived—Dismissal of suit on the ground of want of notice to quit—Fresh suit—Defence of occupancy right—Bar of res judicata.

Per Napier and Odgers, JJ. Where the Kudivaram is found to be in the holder of a service inam, the burden lies on the tenant to prove that his holding is other than that of a tenant from year to year, and if he is not able to establish this he is liable to ejectment by the Inamdar on proof of a proper notice to quit

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* S. A. No 319 of 1919. 23rd Nov., 1923.

Veerasami Mudali v. Palaniyappan

Suryanarayan v. *Polanna* (1918) I L. R. 41 M. 1012 38 M L J 476 ; *Venkata Sastrulu* v. *Setharamudu* (1919) 43 M. 166 P.C ; *Seturatnam Iyer* v *Venkatachala Goundan* (1919) I. L. R. 43 M. 567. Relied on.

Krishnaswami v. *Varadaraja* (1882) I.LR 5 M. 345 (F B) , *Venkatacharlu* v. *Kandappa* (1891) 15 M. 95 ; *Varadaraja* v. *Dorasami* (1892) I. L. R. 16 M. 131 *Venkata Mahalakshmamma* v. *Ramjogi* (1892) I. L. R. 16 M. 271 *Veerannan Ambalam* v. *Annasami Iyer* (1911) 21 M. L J. 845 : *Muthusami Iyer* v *Nainar Ammal* (1918) 7 L .W. 194 distinguished.

It is open to a tenant to acquire permanent rights of occupancy in a temple service inam. A permanent lease of such land no more diverts the land from the intended purposes of the grantor than does an ordinary tenancy from year to year.

Kshetrabrao Bissaji v. *Sobhanapuram Hari Krishna* (1909) I.L.R. 33 M. 340 ; 20 M. L. J. 417 followed.

Upendra Nath Hazra v. *Ram Nath Chowdhury* (1906) I. L. R 33 C. 630 *Midnapore Zemindari Co.* v. *Appayasami Naicker* (1918) 41 M. 749 34 M. L. J. 563 (P. C.) distinguished.

Per Ay'ing and Odgers, JJ. Plaintiff, an inamdar, brought a suit for recovery of possession of certain lands in the possession of tenants who set up in the defence a permanent tenancy. The first Court found the issue as to permanent tenancy against the defendants and decreed the plaintiff's suit with costs The appellate Court agreed with the finding of the first Court on the issue as to permanent occupancy but dismissed the plaintiffs suit for want of notice to quit. The plaintiff was allowed his costs in the trial Court but disallowed costs of the appeal. Subsequently the plaintiff brought a suit for ejectment against the same tenants in respect of the same lands after due notice to quit and the tenants again pleaded in defence a permanent right of occupancy. *Held* that the defence was barred as *res judicata* by the decision in the prior suit.

Muthu Pillai v. *Veda Viyasachariar* (1920) 12 L W 277 *Ramakrishna Naidu* v. *Krishnaswami Naidu* (1918) 36 M. L. J. 641. *Kelu Nambiar* v. *Chatu Nambiar* (1918) 9 L. W. 84 Referred to

Second Appeal against the decree of the District Court of Trichinopoly in A. S. No. 205 of 1917 preferred against the decree of the Court of the District Munsif of Karur in O. S. No. 1362 of 1914.

This Second Appeal came on for hearing on the 9th and 10th days of March 1921.

L. A. Govindaraghava Aiyar for appellant.

V. Ramadoss for respondents.

The Court (*Napier and Odgers, JJ.*) delivered the following

Napier, J.

JUDGMENTS—*Napier, J.*—The suit from which this second appeal arises was brought in the District Munsif's Court of Karur by the plaintiff to recover possession of certain lands in the possession of tenants. He had previously brought two suits in respect of the same property. The first suit had been dismissed for want of a notice to quit, the second suit had been dismissed for failure to give a proper notice to quit. It is admitted that in the second suit the Court found that the defendants had no permanent right of occupancy. In the present suit the plaintiff

Veerasami Mudali v. Palaniyappan

Napier, J.

relied on this finding as *res judicata* in his favour and an issue was framed on that contention, but both the lower Courts have paid very little attention to this question and seem hardly to have dealt with it; but the plaintiff is undoubtedly entitled to argue this question.

The two principal findings of the Lower Appellate Court were that the plaintiff had not proved that kudivaram was in him and, secondly, that, even if he had so proved it, he had not proved that he had a right to evict. I fail to understand why, in view of the finding of the Lower Appellate Court as to the kudivaram, the District Judge did not order the plaint to be returned for presentation to a revenue court.

The question of *res judicata* has been argued at great length by Mr. Govindaraghava Aiyar for the plaintiff, but we eventually intimated our intention not to deal with this matter at the present stage. So I will leave that question for future decision, if necessary.

The question as to the kudivaram is dealt with by the District Judge in paragraph 3 of his judgment. He states that the previous judgment relied on by the plaintiff did express opinions in his favour and that these opinions were formed on the basis that the burden of proof was on the defendants. He then states the law as follows "It is for the inamdar to show either that at the time of the grant he already was in occupation or that the land was *waste* when the grant to him was made," and he concludes by saying, "I think that the District Munsif was right in holding that the plaintiff has not succeeded in establishing that the land itself forms the inam attached to the office which he holds." There was undoubtedly abundant authority for this view at the time that the District Judge pronounced his judgment. He has set out the cases on which he relied, the latest being *Suryanarayana* v. *Patanna* (1) It is not disputed before us that the decisions of the Privy Council reported in *Suryanarayana* v. *Patanna* (2) and *Venkata Sastrulu* v. *Seetharamudu* (3) as explained by the Full Bench in the reference in Second Appeal No. 1878 of 1919 have laid down that the burden of proof is on the tenant and not on the plaintiff. The District Judge is, no doubt, familiar with these later decisions. Mr. Ramadoss for the respondents somewhat faintly contended that the old presumption still remained in the case

1. (1913) I. L R 38 Mad. 608 : 26 M L. J. 99.
2. (1918) I. L. R 41 Mad. 1012 : 36 M L. J. 585. (P.C.)
3. (1918) I. L. R. 43 Mad. 166 : 37 M. L. J 42 (P.C.).

Veerasami Mudali v. Palaniyappan
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Napier, J.

of a service inam. The service inam in this case was admittedly granted by a person styling himself a Chakravarthi or Emperor. The foundation of the doctrine as laid down by the Privy Council is that inams must be presumed to be of the land as well as of a share in the revenue, and Mr. Ramadoss admitted that Second Appeal No. 1878 of 1919* to which the Full Bench applied this doctrine was a service inam. In that case it was poojari service of a temple, whereas in this case it is drummer service. There is, therefore, nothing in this distinction, and we must, therefore, call on the District Judge to submit a revised finding on the first issue in the light of the above rulings and on the documentary evidence in the case, he having already found that the oral evidence on both sides is entitled to little weight. Mr. Govindaraghava Aiyar has asked us to allow him to prove certain documents which he did not tender in the suit as they had been rejected in the previous suit, his contention being that these documents are admissible to prove the nature of the possession. As, however, they were tendered as evidence of a specific lease and rightly rejected as such, I do not think that they are admissible and see no reason to allow him to tender them in this suit.

Coming to the second point, Mr. Ramadoss has contended that, even assuming the kudivaram to have been in the plaintiff, he must still prove his right to eject and has relied on certain decisions of this Court. I desire to express my opinion definitely that, where this defence is sought to be used to compel the landlord to prove affirmatively the nature of the tenant's holding, it is no longer open to the defendant since the two decisions of the Privy Council and that of the Full Bench above referred to. It is true that in none of these cases was the point specifically decided, the reason being, in my opinion, that, where the kudivaram interest has been shown to be in the landlord, it is no longer open to the defendant to call upon the plaintiff to prove that the tenant had not at the date of suit a permanent right of occupancy. The cases relied on by the learned District Judge on this point were those quoted by the District Munsif in paragraph 28 of his Judgment. They are *Vencatacharlu* v. *Kandappa* (1), *Veeranan Ambalam* v. *Annasami Iyer* (2) and *Vencata Mahalakshmamma* v. *Ramjogi* (3). In addition to these, Mr. Ramadoss has relied on *Krishnasami* v.

* See *Muthu Goundan* v. *Perumal Iyer*, 44 M. 588 : 40 M.L.J 429 (F.B.)

1. (1891) I. L. R 15 Mad. 95.
2. (1911) 21 M L. J. 845
3. (1892) I. L. R. 16 Mad. 271.

Varadaraja (1), *Varadaraja* v. *Dorasami* (2), *Velappa Goundan* v. *Doraisami Aiyar* (3), *Veerannan Ambalam Peria Karuppan Ambalam* v. *Annasami Aiyar* (4), and *Muthusawmi Aiyar* v. *Nainar Ammal* (5).

I will deal with these in order. *Krishnasami* v. *Varadaraja* (1) has, in my opinion, been much misunderstood. It was not a decision of a Full Bench on a reference but was a decision in an appeal on the facts of the particular case. The plaintiff's claim rested on an alleged muchilika executed by the tenants to Government as trustee for the temple. The defendants contended that they had previously owned the mirasi right to the land but had resigned that to the temple retaining in themselves the permanent right of cultivation which they had enjoyed from the beginning. Kindersley, J., decided that they had never relinquished the permanent right in themselves and that the evidence tendered to support that contention was that the tenure was permanent. Turner, C. J. and Muthusami Ayyar, J., say as follows:—"Without attempting to define what period of occupation should confer the right of occupancy —a matter which can now only be dealt with by legislation— we consider ourselves at liberty to say that an occupation of upwards of 70 years is sufficient, *under the circumstances of this case*, to throw upon those who seek to disturb it the burden of showing that the tenancy was not accompanied with a right of occupancy, and that the plaintiff has not succeeded in doing so." The words "under the circumstances of this case" have reference to an earlier passage in the judgment which is as follows:—"When there is so much evidence to show that, by the custom of the country and of the district in which the lands in suit are situated, permanent cultivators are entitled to permanent occupancy, we do not see how this privilege can be refused to the defendants, whose ancestors have cultivated the lands they now hold for at least 70 years". This is obviously a decision on the particular facts of the case one of the important features of which is the contention of the defendants that the whole right in the lands was at one time vested in them and was only acquired by the temple by relinquishment from them. It is of no use to the defendants in a case where the kudivaram right is in the landlord.

1. (1882) I. L. R. 5 Mad. 345.
2. (1892) I. L. R. 16 Mad. 131.
3. S. A. No. 469 of 1917.
4. (1911) 21 M. L. J. 845.
5. (1918) 7 L. W. 194.

Veerasami Mudali v. Palaniyappan

Napier, J.

The next case is *Vencatacharlu* v *Kandappa*, (1) In that case the plaintiff, an inamdar, sued to eject the defendant from certain lands. The judgment is very short and is as follows :— "On the findings of both Courts, it must be taken that the only facts proved are that the plaintiff is the Inamdar of the village, that the defendant and his father have been in occupation of the lands for 40 or 50 years as tenants." It is clear, therefore, that there was no evidence let in to show that the kudivaram was in the plaintiff and the decision is, therefore, of no value whatsoever.

Varadaraja v *Dorasami*, (2) was a suit in ejectment, the land in question being the property of the temple of which the plaintiff was the trustee. The whole question turned on the terms on which the defendants had been let into possession in 1832 by takids and a muchilika executed by the defendants' ancestor. The judgment states the question in the following words, was that muchilika of a permanent character? " and concludes as follows :—" We are of opinion that there is evidence from which it can be legally inferred that the lease of 1832 was a permanent lease, and, that being so, the plaintiff's suit must fail." This again is a decision on the construction of the particular document and is of no assistance to us in the disposal of this case.

The next case is *Vencata Mahalakshmamma* v *Ramajogi*, (3) which was referred to by the District Munsif and relied on by the District Judge. This was not an inam case at all, but a suit by a zamindarini in ejectment against a ryot. The judgment contains the following passage : "The district Judge held that, as between the zemindar and the ryot the former was merely the assignee of land-revenue whilst the latter was *prima facie* the the owner of the soil. * * * For the appellant it is contended that it was for the ryot to establish his occupancy right." The Court then proceeded to consider the facts of the case and held that there was nothing to show that the zamindar had let the ryot into possession. The Court then decided as follows :—" It may be that the ryot was in possession when the zamindary itself was created, or that the zamindar, as pointed out by the Judge, was a mere farmer of the revenue. In such cases it is not unreasonable to hold that the *onus* of showing, that the tenancy commenced under the plaintiff or his ancestors

1 (1891) I. L. R 15 Mad. 95. 2. (1892) I. L. R. 16 Mad. 131,
3. (1892) I. L. R. 16 Mad 271.

Veerasami Mudali v. Palani-yappan.

Napier, J.

rests on the zamindar, and that until he shows it, the zamindar may be fairly presumed to have been the assignee of Government revenue." This proposition has repeatedly been laid down by this Court with regard to zamindary tenants but has no bearing at all on cases where the kudivaram interest is in the landlord.

Veeranan Ambalam v. *Annasami Iyer*, (1) also relied on by the District Judge was a suit by a Government ryotwari holder to eject his tenants who had been in possession for over 100 years. The Court held that it lay upon him to show that the tenancy was one from year to year. This decision is, however, directly opposed to the recent ruling of the Privy Coucil in *Seturatnam Aiyar* v. *Venkatachala Goundan*, (2) in which their Lordships held that, in a suit brought by a Government pattadar against the respondents after due service of notice to quit, the *onus* was on the tenants to prove the existence of their right of permanent occupancy. Assuming that the position of a ryotwari pattadar *is* analogous to that of an inamdar owning the kudivaram interest, this decision of their Lordships directly negatives the view held by the District Judge.

There remain the cases in *Muthuswami Aiyar* v. *Nainar Ammal*, (3) and *Velappa Goundan* v *Doraisami Iyer*, (4). In the former case the plaintiff, the trustee of a temple, under an inam granted by Government in 1865, sued to eject the defendant from certain temple lands. The case was remanded by the High Court on two findings, one was that what was granted was the land itself, and the other was that the lands were unoccupied at the time of the grant, and occupancy rights if any must have been acquired *since* the grant. The Bench decided that, on the facts of the facts of the case, there was no ground for holding that the primary burden of proof which was on the landholder to prove the tenancy alleged by him and his right to eject had been discharged. Their Lordships were obviously influenced by the decision in *Suryanarayana* v. *Patanna*, (5) to which they referred which has been reversed by the Privy Council. In my opinion, the dicision can no longer be said to be good law unless it is to be supported entirely by the facts of the cases. In *Velappa Goundan* v *Duraisami Iyer*, (4) the

1. (1911) 21 M. L. J. 845.
2. I. L. R. 43 Mad. 567: 38 M. L. J. 476. (P. C.)
3. (1918) 7 L. W. 194.
4. S. A. No. 469 of 1917.
5. (1913) I. L. R. 38 M. 608 : 26 M. L. J. 99.

Veerasami Mudali v. Palaniyappan.

Napier, J.

same view was taken and the same observations apply. Against the view that the burden lies on the plaintiff, there is first the presumption of a tenancy from year to year in leases governed by the Transfer of Property Act. Admittedly, the Transfer of Property Act does not apply, and I myself have always objected to analogies drawn from this chapter preferring to follow English law where applicable, but other Judges of this Court have laid down that it is proper to apply such analogies. Mr. Govindaraghava Aiyar has, however, drawn our attention to a case prior to the Transfer of Property Act in *Endar Lala* v. *Lalhi Hari* (1). In that case the plaintiffs instituted a suit to recover possession of certain lands. The defendants, relying on long possession at an invariable rent, contended that the burden of proof lay on the plaintiffs to establish their right to eject. The bench laid down the proposition "In all ordinary cases the presumption of law is that a tenant is a tenant from year to year, unless a larger right can be shown by the evidence of a lease or agreement to that effect. * * * The presumption being that a tenant is a tenant from year to year, no length of possession by itself can confer a perpetual lease. Once a tenant, always a tenant, is the rule; and, unless there is evidence of a lease, the proprietor can oust after due notice." *Thiagaraja* v. *Giyana Sambanda Pandara Sannadhi*, (2) was a suit by the trustee of a temple to eject the defendants from the lands in the village. The defendants had admittedly been in possession of the lands in question since 1827 which was 50 years before the date of the suit. In 1830 they had executed a muchilika for the lands to Government as trustee of the temple describing themselves as *paracudis* and agreeing to cultivate the lands, no term being fixed for the holding. The Bench decided that it lay upon the defendants to show that they had any higher right than that of cultivating tenants from year to year. According to English law where the ownership of the lands is found to be in the landlord, a presumption arises that tenants in possession are tenants from year to year and it rests upon them to prove that the lease is either for a term or otherwise inconsistent with the plaintiff's right to eject. It is, of course, conceded that, with regard to Zamindars the presumption being that they are only farmers of revenue, it rests on them to show that they let the tenant into possession. But in the case of in inam of

1. 7 B. H. C. R. (Appellate) 111.
2. I. L. R. 11 M. 77.

Veerasami Mudali v. Palaniyappan, — Napier, J.

the land, as in the case of the ryotwari pattadars, I am clear that the burden of proof that the tenancy was a permanent one rests on the tenant, and, if he is unable satisfactorily to discharge that proof, he can be ejected on proper notice to quit. Mr. Govindaraghava Aiyar has urged that a permanent right of ocupancy is akin to an alienation and, as such, incompatible with a service tenure. He points out that clause 16 of S. 3 of the Madras Estates Land Act removes lands held on service tenure from the category of ryoti lands, but this is done for the purpose of preventing a service-holder from claiming to be a ryot within clause 15. He relies on *Upendra Nath Hazra* v. *Ram Nath Chowdry*,(1) in which the Bench held, following an earlier decision of the same Court, that tenants of ghatwali service lands could not acquire permanent right of occupancy, the foundation of the doctrine being that it is inconsistent with the incidents of such tenure. Speaking for myself, whatever may be the case of ghatwali service tenure, I can see nothing inconsistent. Admittedly the acquisition of such permanent rights would not prevent the resumption of the inam if the services were not rendered, and I cannot see why the payment of a fixed rent on a perpetual tenure to a service-holder has a more serious effect on the discharge of his duties as a drummer in a temple. *Midnapore Zamindari Company* v. *Appayasami Naicker*, (2) laid down what is undisputed law that lands held on service tenure cannot be alienated beyond the lifetime of the holder for the time being, the principle being to allow such alienation would divert the lands or their proceeds from the intended purpose; but a permanent lease no more diverts the land than does an ordinary tenancy from year to year, and there is no authority in this Court for such a proposition. I am not, therefore, prepared to hold that permanent rights of occupancy cannot be acquired in a temple service inam.

In the result, I would hold that, where the kudivaram is found to be in the holder of a service inam, the burden lies on the tenant to prove that his holding is other than that of a tenant from year to year, and, if he is not able to establish this, he is liable to ejectment on proof of a proper notice to quit. In this view, we must call upon the District Judge for a revised finding on the second issue in the light of the above observations. Time for submission of findings one month after re-opening of the District Court and 14 days for objections.

1. (1906) I. L. R. 33 Cal. 630. 2. (1918) I.L.R., 41. Mad. 749 : 34 M.L.J. 563.

Veerasami Mudali v. Palaniyappan.

Odgers, J.

Odgers, J.—The questions arising in this appeal have been dealt with at length by my learned brother and I shall content myself with adding only a few words. As to the question of kudivaram since the Privy Council decisions in *Suryanarayana* v. *Patanna* (1) and *Venkata Sastrulu* v. *Seetharamudu* (2) and the explanation of them contained in the Full Bench judgment of this Court in S. A. No. 1878 of 1919* there is no room for doubt that the onus of proving a permanent occupancy right is on the tenant. The present case cannot in this respect be distinguished from the case before the Full Bench, and in my opinion that is conclusive of this matter.

It was however contended that in spite of this the onus was still on the plaintiff to establish his right to eject the tenant, in other words, it was contended that in spite of the decisions above referred to, the plaintiff was still to prove the nature of his tenant's holding. The cases relied on by the respondents have been elaborately reviewed by my learned brother, and I do not propose to examine them again. I agree with the conclusions he has drawn as the result of his examination. There is a clear presumption in the Full Bench ruling in favour of the inamdar's right to both varams. It may be weak or strong, but whichever it is, it must be displaced by evidence on the part of the tenant. It is therefore clear that while this presumption exists in favour of the inamdar it is no concern of his to give evidence as to the nature of his tenant's holding, unless and until the presumption in his favour has been displaced by evidence offered by the tenant, and the onus consequently shifted on to the landlord by reason of his tenant's evidence. It therefore seems to me that the cases quoted for the respondents to the effect that there is still an onus on the plaintiff-landlord are no longer law.

I will deal with only one other point, namely as to the allegation that a permanent right of occupancy practically amounts to an alienation and therefore in the case of an inam grant would be illegal. We were referred to two cases *Venkateswara Yettiapah Naicker* v. *Alagoo Mootoo Servagaren* (3) and *Kshetrabaro Bissogi* v. *Sobhanapuram Harikrishna Naidu* (4). In *Vencateswara Yettiapah Naicker* v. *Alagoo Mootoo Servagaren*,

* See *Muthu Goundan* v. *Perumal Aiyar.* 44 M. 588 : 44 M. L. J. 429 (F.B.)

1. (1918) I. L. R. 41 Mad. 1012 : 36 M. L. J. 585 (P.C.).

2. (1919) I. L. R 43 Mad. 166 : 37 M. L. J. 42 (P.C).

3. 8 M. I. A. 327. 4. (1910) I. L. R. 33 Mad. 340 : 20 M L. J. 417.

it was held that a perpetual lease was not within the mischief of the provisions of Madras Regulation 25 of 1802 as it was not, "a sale, gift or transfer" of the whole or any portion of the Zamindari in question. *Kshetrabaro Bissogi* v. *Sobhanapuram Harikrishna Naidu* (1) it was held that a grant of a permanent lease was not a transfer of ownership and was not therefore an alienation. The estate in that case was a service inam. The case in *Midnapore Zamindari Company* v. *Appayasamy Naicker* (2) simply lays down that lands held on service tenure are inalienable beyond the life-time of the holder, *i.e.*, that he cannot make a valid transfer of the ownership to last beyond that time. The case in *Upendra Nath Hazra* v. *Ram Nath Chowdhury* (3) held that tenants of ghatwali service lands could not acquire permanent rights of occupancy as the latter were inconsistent with such a tenure. I am not prepared to say that this ruling is in fact inconsistent with the cases in *Vencateswara Yettapah Naicker* v. *Alagoo Mootoo Servagaren* (4) and *Kshetrabaro Bissogi* v. *Sobhanapuram Harikrishna Naidu* (1) quoted above, as it is clear that whatever may be incidents of ghatwali tenure, the inam could undoubtedly be resumed if the services were not performed. If this case is in fact inconsistent with the Madras case, then I am bound to say that I prefer to abide by the latter ruling.

I agree with the conclusions at which my learned brother has arrived and I also agree with him, as to the findings to be returned by the District Judge. The issues on which revised findings were called for by the High Court were :—

(1) Whether the plaint land belongs to the plaintiff as service inam land or whether the taram assessment alone is inam ?

(2) Whether the defendants are in possession as lessees or whether they are owners of, or have acquired occupancy right by prescriptive enjoyment ?

After a consideration of the evidence the District Judge submitted the following findings :—

" My finding on the 1st issue is therefore that the tharam theerva and not the land itself belongs to the plaintiff as inam for rendering the Davanda service in the plaint mentioned temple."

1. (1910) I. L. R. 33 Mad. 340 : 20 M. L. J. 417.
2. (1918) I. L. R. 41 Mad. 749 : 34 M. L. J. 563.
3. I. L. R. 33 C. 630.
4. 8 M. I. A. 327.

Veerasami Mudali v. Palaniyappan. — Odgers, J.

In the view I have taken on the 1st issue it is not necessary to record a finding on the second issue."

" The defendants themselves are the owners of the land subject to the payment of a fixed tharam theerva of Rs. 9-2-4 to the inamdar rendering Davanda service in the plaint mentioned temple. By long enjoyment of the lands subject only to that burden, the defendants have also prescribed for a permanent tenancy for occupancy right in respect of the suit land subject only to the payment of tharam theerva to the plaintiff for rendering Davanda service, in the plaint mentioned temple."

This Second Appeal again came on for hearing on Tuesday and Wednesday, the 7th and 8th days of March 1922, respectively, after the return of the findings of the Lower Appellate Court upon the issues referred by this Court for trial.

The Court (AYLING and ODGERS, JJ.) delivered the following: —

Ayling, J.

JUDGMENTS—*Ayling, J.*—In my opinion no good ground is shown for refusing to accept the District Judge's finding on the first issue referred to him, " that the tharam theerva and not the land itself belongs to the plaintiff as inam."

This would be a good defence to the present suit, but we have still to consider the third issue which runs thus :—

3. Is the defence barred as *res judicata* by the decision in O. S. No. 994 of 1907 and the appeal thereon ?

O. S. No. 994 of 1907 and the suit out of which the present appeal arises were admittedly between the same parties or their representatives in interest and were brought to obtain exactly the same relief in respect of the same land. In each, the present plaintiff-appellant sued to recover possession of the suit land from defendants as forming the inam to which he was entitled, and in each the same defence was raised that the inam comprised not the land, but the assessment on it. In O. S. No. 994 of 1907 the District Munsif decided this point embodied in issue 1 as well as others with which we are now not concerned in plaintiff's favour, and gave him a decree as sued for. The District Judge in A. S. No. 90 of 1910 confirmed this finding, but allowed the defendants to raise a fresh defence that the suit was premature for want of notice to quit. This he decided in defendants' favour, and accordingly directed that the suit should be dismissed. But he added : "As the plaintiff succeeded on the main contention and failed on a point taken

only in appeal it will be equitable to direct each party to bear part of the cost. The appeal is allowed. The lower Court's order that defendants should bear all the costs in that Court will stand." In so far as the District Judge's finding on issue I was liable to appeal (i.e., in so far as it involved any question of law), it was open to appeal to this Court for, although plaintiff's suit had been dismissed, this finding was made explicitly the ground for directing defendants to bear all the costs in the first Court. No appeal however was filed by defendants.

The District Judge's determination of the issue must therefore be regarded as final : and it seems to me that every word of S. 11 of the Code of Civil Procedure applies, and that the decision operates as *res judicata*. It is argued that the determination of the issue was unnecessary. But the order awarding plaintiff his costs in the first Court which is expressly based upon it, is as much a part of the decree as the order dismissing plaintiff's prayer for possession. The District Judge in effect decided all the points in dispute, and found that the plaintiff was entitled to recover possession of the land, conditionally on his giving defendants a proper notice to quit. Defendants are not entitled to re-agitate the points then decided against them.

I hold therefore that the decision in the appeal from O. S. No. 994 of 1907 operates as *res judicata.*

In this view plaintiff would be entitled to a decree as sued for: but before passing such a decree we must call for a finding from the Lower Appellate Court on issue 4. Finding will be submitted within a month from this date ; and 7 days will be allowed for filing objections.

Odgers, J.

Odgers, J.—I would accept the findings of the District Judge that the taram theerva and not the land itself belongs to the plaintiff.

The question (which was not decided when the second appeal was before Napier, J. and myself) remains as to whether the matter is *res judicata* by reason of the decree in O. S. No. 994 of 1907 whereby it was declared that plaintiff as inamdar was entitled to the plaint land together with costs of the suit, but that plaintiff's suit was dismissed inasmuch as the notice to quit given by him was irregular (*cf.* District Munsif's Judgment Exhibit O paragraph 30 confirmed by the District Judge, Exhibit O. 1 paragraph 5). It is to be noted that the question of notice to quit did not find a place in the issues and

Veerasami Mudali v. Palaniyappan.

Odgers, J.

was only raised before the District Judge. The point is whether this issue as to plaintiff's title has been heard and finally decided under the provisions of section 11, Civil Procedure Code, the defendants got a decree in their favour on the question of notice and it is contended that no adverse finding in the suit could operate as *res judicata* against them. In *Muthu Pillai* v. *Veda Viyasa Chariar* (1) a somewhat similar case, it was held (1) the question of title was directly and substantially in issue in the prior suit, (2) that in order to constitute *res judicata* the finding in the prior suit need not form the basis of the decree in that suit, and (3) that the finding in the previous suit did operate as *res judicata* in the present suit. It was also held in *Ramakrishna Naidu* v. *Krishnasami Naidu*, (2) that it was not necessary that the decision of the issue should have been the basis of the decree. On the other hand it is contended that the decision is not final and was not necessary for the disposal of the suit as held in *Kelu Nambiar* v. *Chathu Nambiar* (3), to which my learned brother was a party. There the decision was not the basis of the decree which was given in spite of it and it was held that in such cases the matter cannot be said to have been substantially in issue. Here the plaintiff's title was the first issue in the case and a decision was given upon it by both Courts. It was not until the appeal that the point of the notice to quit was taken and decided against plaintiff. Moreover the defendants might have appealed against the decree in so far as costs were awarded against them which award was expressly made on the ground that the finding as to title was against them. This is as much a part of the decree as anything else.

It is further contended that the latest adjudication should be taken as superseding the notice and therefore the District Munsif's Judgment in O. S. No. 331 of 1912 (Exhibit P), dated 5th June 1913, in which he dismissed the suit for want of a valid notice to quit should be taken as the final decision. There the question of notice to quit was directly raised by the issues and it was the only issue decided by the District Munsif. The plaintiff's title did not therefore come up for decision and it cannot be said to be a later adjudication on that point at all.

In *Nundo Lall Bhuttacharjee* v. *Bidhoo Mookhy Debee*, 4 relied on for respondents, a landlord had brought a suit in

(1). (1920) 12 L. W. 277.
(2). (1919) 36 M. L. J. 641,
(3). (1919) 9 L. W. 84.
(4). (1919) I L. R 13 Cal. 17,

Veerasami Mudali v. Palaniyappan. — Odgers, J.

ejectment against his tenant who pleaded no notice to quit and permanent tenure. The suit was dismissed on the first ground, the Court also holding that the tenure was not permanent. In a subsequent suit for ejectment between same parties in respect to the same holding the tenant pleaded the tenure was permanent and plaintiff was estopped by conduct from pleading that it was not. The lower Court held in defendant's favour on the second point and dismissed the suit. The High Court in appeal held that previous decision was not *res judicata* on the ground that the decree dismissing the suit was not based on the finding adverse to the defendant. The Court however held " that if they came to an opposite conclusion the issue then decided was not an issue regarding estoppel by conduct." It is to be noted that defendant appealed against the decree in former suit to High Court but that appeal was dismissed on the ground that he could have no appeal as the only decree passed was one dismissing the suit. That seems to me to differentiate the case and also the fact that the view of the High Court on this point is put forward somewhat tentatively with practically no reasons assigned and the learned Judges support their decision by an alternative.

A case in the Privy Council, *Midnapur Zamindari Company* v. *Naresh Narayan Roy*, (1) is also cited by Mr. Ramadoss for respondent. There in 1877 a zamindar sued for possession and the tenants pleaded occupancy rights and prematurity, as no attempt had been made to settle a fresh rent. The Court dismissed the suit holding that there was no occupancy right but the suit was premature. The zamindar appealed to the High Court and the tenants filing a cross-appeal to the finding that they had no occupancy right. The High Court affirmed the decree on the ground that the suit was premature and also on the cross-appeal affirmed the finding that there was no occupancy right. Their Lordships found that this would not support an actual plea of *res judicata* as the defendants having succeeded on the plea of prematurity had no occasion to go further as to the finding against them: a finding which it was their duty to displace and which duty they had not been able to perform. This appears to me to be distinguishable from the case before us.

1. (1921) I. L. R 48 Cal 460.

Veerasami Mudali v. Palaniyappan.

Odgers, J.

As already observed the point of notice was not taken before the District Munsif at all. The question of title was raised as the first issue before the District Munsif and the learned District Judge begins his judgment by saying that the decision turns mainly on the question whether the defendants who occupy it possess occupancy right in the land. This is discussed through three pages of print. On the question of notice the District Judge called for a finding on the return of which he dismissed plaintiff's suit for prematurity but ordered that the District Munisf's order giving plaintiff all the costs in his Court should stand and that as regards the District Court the plaintiff was to bear his own and defendants' costs where he had failed. No appeal was filed to the High Court; the decree of the District Judge therefore became final.

This order as to costs against the defendants appears to me to effect a radical distinction between this case and those cited above for the respondent; and the costs were awarded on the ground that the question of title had been found in plaintiff's favour. I therefore agree that the matter is covered by section 11, C. P. C., and the respondents are not entitled to have the matter re-opened. I also agree with the order proposed as to issue 4.

In compliance with order contained in the above judgment the District Judge of Trichinopoly submitted a finding that the plaintiff was entitled to mesne profits at the rate of Rs. 136 a year.

This Second Appeal again came on for hearing on Tuesday, the twenty-second day of August, 1922, after the return of the finding of the Lower Appellate Court upon the issue referred by this Court for trial.

The Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following.

JUDGMENT:—We are unable to understand the reasoning of the learned District Judge in arriving at his finding, and we are therefore unable to accept it even though it is one of fact. We would call upon him to submit a revised finding on the issue in question We think the parties may be allowed an opportunity to adduce fresh evidence on the point as the evidence on record seems to be too meagre to arrive at a satisfactory finding. Finding will be submitted in two months and 7 days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Trichinopoly submitted a finding that the mesne profits should be fixed at Rs 115 a year.

This Second Appeal again coming on for hearing on Thursday, the twenty-second day of March, 1923, after the return of the revised finding called for by the order of this Court made herein, dated the 22nd August, 1922.

The Court (Krishnan and Venkatasubba Rao, JJ.) delivered the following

JUDGMENT :—We regret we are again unable to accept the finding as to mesne profits, by the learned District Judge. All the documentary evidence which the Judge himself has set out would make out the mesne profits to be much smaller than what has been found. The learned Judge has relied on the evidence of P. W. 2, but the evidence as set out by him is that of P. W. 1. The learned Judge has not indicated why he rejects the inference from the documents, which are usually more reliable than the oral evidence. We must request the Lower Court to submit a further revised finding on the point; this time it will be on the evidence already on record. Finding will be submitted in eight weeks. Ten days are allowed for filing objections to the finding.

In compliance with the order contained in the above Judgment the District Judge of Trichinopoly submitted a finding that the suit lands were 23 and odd acres in extent and that mesne profits should be fixed at Rs. 23 a year.

This Second Appeal coming on for final hearing after the return of the revised finding of the Lower Appellate Court called for by the order of this Court made herein, dated the 22nd March, 1923.

The Court delivered the following

JUDGMENT :—We accept the finding that the mesne profits should be awarded at Rs. 23 a year. The result is that Second Appeal is allowed and plaintiff's suit for possession is decreed with mesne profits at the rate above stated for three years before suit and till the delivery of possession or for three years whichever is earlier from the date of this decree.

The parties will pay and receive proportionate costs throughout.

Appeal allowed.

A. V. V.

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Nagendra Bala Dasi and another *Appellants*

v.

Dinanath Mahish and others *Respondents.*

(On appeal from the High Court at Calcutta.)

P. C.

Nagendra Bala Dasi v Dinanath Mahish

Legal Practitioner—Purchase benami in name of his wife of decree in suit in which he acted for judgment-debtor—Purchase of property in execution of that decree in name of his wife—Leave to bid obtained by wife without disclosing fact that she held benami for her husband—Validity of purchases—Husband not pleader at time of execution sale—No advantage gained by him at that time by reason of his former position as pleader for judgment-debtors—Effect—Trusts Act, S. 88.

The holder of a decree for sale, which had been executed in part, sold the unexecuted decree to the 1st. appellant. The 1st appellant was the wife of the 2nd, who had acted as pleader for the defendants in the suit for sale in which the decree in question was passed, and the purchase of the decree by the wife was truly benami for the husband. The wife executed the decree, and purchased, with leave of Court, certain properties at a sale held in execution of the decree.

In a suit by the judgment-debtor to have it declared that the purchase was bad as a purchase by a pleader of the property in suit with the concealment of the fact that he was the real purchaser, it was contended for the appellants that the sale effected under the decree must stand because (1) the decree was a good decree in their hands, (2) at the time of the sale of the properties in question the 2nd appellant had long ceased to be pleader for the judgment-debtors, and they were represented by other pleaders, and (3) there was no suggestion that any knowledge which the 2nd appellant had obtained while he acted as pleader was in any way conducive to his action in buying the properties through his wife.

Held, overruling the appellants' contentions that the purchases of the decree and of the properties at the sale not having been open and above board the said purchases were bad. The husband allowed his wife to get leave to bid and then to purchase without disclosing the fact that she really held benami for him. If this fact had been disclosed the leave to bid would have been refused. Thus an advantage was got by the husband being allowed to bid under color of his wife's name and then to buy. This deception vitiates the sale of the properties also.

Had the purchase of the properties been open and above board by the husband the result might have been otherwise, for the disability attaching to him as pleader which would have prevented him cannot exist indefinitely and provided he had not availed himself in any way of knowledge gained in his position of pleader, there would have been nothing to prevent his acquiring the property of his *quondum* clients.

P. C.

Nagendra Bala Dasi v. Dinanath Mahish

Appeal (No. 39 of 1923) from a decree (May 20, 1921) of the High Court varying a decree of the officiating Subordinate Judge of Midnapure.

De Gruyther, K. C. and *B. Dube* for appellants.

Abdul Majid for respondents.

1923 Nov. 29. The Judgment of their Lordships was delivered by

Lord Dunedin.

Lord Dunedin.—In 1901 certain persons, among whom were the respondents, borrowed a sum of Rs. 19,999 from the Raja Narendra Lal Khan Bahadur and executed a mortgage in favour of his wife, Rani Marinalini Debi. In 1906 the Rani put the mortgage in suit. Defences of various kinds were entered. The male appellant in this case acted as pleader for all the defendants, and on their behalf effected a compromise of the suit. This compromise was dated Feb. 19, 1907. Payments under the compromise not having been duly made, the Rani proceeded to execute afresh and some properties were sold, but eventually, and before the decree was fully executed, the Rani, on February 7, 1915, sold the unexecuted decree for Rs. 11,500 to the female appellant, who is the wife of the male appellant. Thereafter the female appellant proceeded to execute the decree. Objections were made by several of the judgment-debtors. It is not necessary for the purposes of the present appeal to follow minutely the progress of the execution proceedings. It is sufficient to state that some of the properties were brought to sale and that the female appellant, on February 18, 1918, obtained leave to bid, and that she herself purchased certain properties at the sale.

The present suit was raised by the judgment-debtors to have it declared that the purchase of the unexecuted decree was really a purchase benami of the male appellant ; that it was therefore bad as purchase by a pleader of the property in suit with concealment of the fact that he was the real purchaser and praying for appropriate relief.

The Subordinate Judge found that the purchase was benami, and ordered a reconveyance of the decree to the plaintiffs on payment of Rs. 13,750, being the amount paid on the transfer of the decree plus certain sums which had been paid to save property being taken for other executions. The High Court so far affirmed the judgment, but added that the defendants must also convey the properties purchased by the female defendant at the sale in execution of the decree.

P. C.
Nagendra Bala Dasi v. Dinanath Mauish
Lord Dunedin.

As both Courts had found that the purchase of the decree by the wife was truly benami for the husband, who was at that time the pleader, the appellants were obliged to accept this fact. Their argument, however, came to this They admitted that the result is that they are bound to surrender the unexecuted decree to the respondents at the price they paid for it ; but they say that the decree was a good decree in their hands and that sales actually effected under it must stand. At the time of the sales of the properties in question the male appellant had long ceased to be pleader ; the respondents were represented by other pleaders, and it was not said that any knowledge he had obtained while he acted as pleader was in any way conductive to his action in buying the properties through his wife when the properties were offered for sale upon the execution of the decree.

Their Lordships have carefully considered this argument, but they do not think that in the circumstances it is good. Had the purchase of the properties been open and above board by the male appellant the result might have been otherwise, for the disability attaching to him as pleader which would have prevented him cannot exist indefinitely, and provided he had not availed himself in any way of knowledge gained in his position of pleader, there would have been nothing to prevent his acquiring the property of his *quondum* clients. The conseqences which ensue from a person in a confidential position making use of that position to obtain an advantage over the person with whom he is in confidentiality are embodied in S. 88 of the Indian Trusts Act. That Act does not apply to the part of India with which there is here concern, but the ordinary equitable conditions which are applicable come to the same result. Now there is no more certain way of taking advantage than the way of concealment. The matter is expressed very clearly by the Lord Chancellor (Lord St. Leonards) in *Lewis* v. *Hillman* (1) "I should lay it down as a rule that ought never to be departed from that if an attorney or agent can show he is entitled to purchase, yet if instead of openly purchasing he purchases in the name of a trustee or agent without disclosing the fact, no such purchase as that can stand for a single moment."

The same doctrine is repeated in the latter case of *Mc Pherson* v. *Watt* (2), where Lord O'Hagan lays down the

1. (1852) 3 H L C 607 at 630. 2. (1877) 3 A C 254, 266.

P. C.
Nagendra Bala Dasi v. Dinanath Mahish
Lord Dunedin.

conditions which must exist to validate a purchase by an attorney from his client, and adds "And although all these conditions have been fulfilled, though there has been the fullest information, the most disinterested counsel and the fairest price, if the purchase be made covertly in the name of another without communication of the fact to the pleader the law condemns and invalidates it utterly. There must be *uberrima fides* between the attorney and the client, and no conflict of duty and interest can be allowed to exist."

These dicta are not directly applicable here, because the buying of the decree was not a contract between the pleader and the persons with whom he was in confidentiality, but between him and the Rani. But such advantage as he secured he must give up. This is admitted by the appellants so far that they admit he must surrender the decree for what he gave for it. But having got the decree, what use did he make of it? He allowed his wife to get leave to bid and then to purchase. Now here again there was concealment. Had the Judge been told that the wife really held benami for the pleader, who had had no business to acquire the decree, their Lordships cannot doubt that the leave to bid would have been refused. That an advantage was got by the pleader being allowed to bid under colour of his wife's name and then to buy, their Lordships cannot doubt, for otherwise the point would not be contested. They therefore come to the conclusion that the second deception vitiates the sale also; that consequently the male appellant cannot be allowed to keep the purchase made in name of his wife, and that the Judgment of the appellate Court was right.

The result is that this appeal should be dismissed with costs, and their Lordships will humbly advise His Majesty accordingly.

Solicitors for appellants *Watkins and Hunter.*

Solicitors for respondents Nos. 1 to 4 *Francis and Harker.*

Appeal dismissed.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Kaju Mal and others *Appellants*

v.

Salig Ram *Respondent.*

(On appeal from the Chief Court of the Punjab.)

P. C.
Kaju Mal *v.* Salig Ram

Punjab Pre-emption Act II of 1905, *S.* 3, *Sub-S.* 1—*Agricultural land—Tea garden of extent of fifteen or sixteen hundred acres if a—Punjab Alienation of Land Act XIII of* 1900, *S.* 2, *Sub-S.* 3.

Held, affirming the Judgments of the Courts below, that a tea garden in the Punjab of the extent of about fifteen or sixteen hundred acres fell within the definition of "agricultural land" in S. 3, Sub-S. (1) of the Pre-emption Act II of 1905.

Appeal and Cross-Appeal (Nos. 93 and 94 of 1922) from a decree of the Chief Court of the Punjab (January 30, 1919) modifying a decree of the Senior Subordinate Judge of Kangra.

Dunne, K. C. and *S. Hyam* for the appellants.

Sir G. Lowndes, K. C. and *Wallach* for the respondent.

The Judgment of their Lordships was deliered by

Lord shaw.

Lord Shaw :—These are two appeals from a decree of the Chief Court of the Punjab.

The suit is for possession by pre-emption of a portion of an estate known as the Gopalpur Tea Estate. The issue in the case, upon which argument was presented to the Board, is in the following terms " Is the property in suit definable as agricultural land. .within the meaning of S. 3 of the Pre-emption Act ? " The reference is to Act II of 1905 and particularly to S. 3, Sub-S. (1).

Under that definition " agricultural land " is declared to mean " 'land' as defined in the Punjab Alienation of Land Act, 1900. "

The reference is to the Act XIII of 1900 and to S. 2, Sub-S. (3), thereof. The relevant portions of the definition there given are as follows " The expression 'land' means land which is not occupied as the site of any building in a town or village, and is occupied or let for agricultural purposes or for purposes subservient to agriculture. "

P.C.

Kaju Mal v. Salig Ram.

Lord Shaw.

The issue was accordingly properly framed and the argument was confined, as stated, to the simple question whether this land, which extended to about fifteen or sixteen hundred acres, came within the definition of land which is "agricultural land." Upon that subject both Courts have pronounced Judgment clearly affirming that this tea garden in Punjab falls within the definition of "agricultural land." They have given sound and sensible reasons, if reasons were required, for the affirmation of that proposition and this Board does not think it necessary to cover the ground any further, and merely contents itself with affirming in all particualrs the decree appealed from.

Their Lordships will accordingly humbly advise His Majesty that the appeal fails.

There is a cross-appeal. That cross-appeal is partly covered, no doubt, by the Judgment already delivered and it is sufficient to say that their Lordships will humbly advise His Majesty that this cross-appeal should also be dismissed.

The parties will bear their own costs of these appeals.

Solicitors for the appellants : *Barrow, Rogers and Nevill.*

Solicitors for the respondent : *Ranken, Ford and Chester.*

Appeal dismissed.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD BLANESBURGH AND SIR JOHN EDGE.

Ramabai *Appellant.*

v

Harnabai *Respondent.*

ON APPEAL FROM THE HIGH COURT AT BOMBAY.

P. C.

Ramabai v. Harnabai

Hindu Law—Adoption—Inheritance—Leprosy as a dis-qualification.

Leprosy, to disqualify from inheritance under Hindu Law, must be characterised by deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease.

Kayarohana Pathan v. *Subbaraya Thevan*, (1913) I. L. R. 38 M. 250 : 25 M. L. J. 351. *Mohunt Bhagaban Ramanuj Das* v. *Mohunt Roghunundun Ramanuj Das*, (1895) L. R. 22 I. A. 94 and *Janardhan Pandurang* v. *Gopal*, (1868) 5 B. H. C. R. (A. C. J.) 145, followed.

ON APPEAL from a judgment and decree of the Bombay High Court (Scott, C. J. and Shah, J.) affirming the judgment and decree of the Subordinate Judge of Poona.

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* 1st February, 1924.

P.C.

Ramabai v. Harnabai

Narayan and his son Vishnu were members of a joint Hindu family possessed of large moveable and immoveable properties. Narayan suffered from leprosy and died in 1914; Vishnu predeceased his father in 1913.

On August 12, 1915, the 1st respondent Harnabai, daughter of Narayan, instituted this suit against Ramabai, the appellant, (widow of Vishnu) and Vishnu Puranik, the second respondent, (who claimed to be the adopted son of Narayan), in the Court of the Subordinate Judge, Poona, alleging *inter alia* that her father, who was alleged by the appellant to be a leper, was not in fact a leper, denying the validity of Puranik's adoption, and therefore, claiming the suit properties for herself as the sole heir of her deceased father.

Ramabai by her written statement alleged that Narayan suffered from a serious type of leprosy, and thus lost his right to the suit properties, that Vishnu was the sole owner of them at his death, that she succeeded him as his widow and as daughter-in-law of Narayan, and that the alleged adoption of the second respondent was neither true nor valid, as Narayan had no capacity to adopt.

Puranik's written statement alleged (*inter alia*) that Narayan performed his adoption ceremony according to Hindu religious rites to the knowledge of Ramabai, who was thus estopped from denying the fact of adoption. He, therefore, claimed the suit properties as the validly adopted son of Narayan, deceased.

The Subordinate Judge of Poona held that the adoption of Puranik was proved and valid, that Narayan was not disqualified from adopting by reason of his leprosy, and that, as Vishnu was the true adopted son of Narayan, Harnabai was not Narayan's legal heir. He, therefore, gave judgment for Harnabai as against Ramabai but dismissed the suit as against Puranik.

The High Court at Bombay (Scott, C. J. and Shah, J.) on appeal affirmed the findings of the trial Judge, and held that leprosy, to disqualify from participating in the joint family property, must be of the sanious or ulcerous kind, which Narayan's was not, and that on the death of his son Vishnu, Narayan took by survivorship the whole of the joint family property, which, therefore, did not descend to Ramabai but passed to his adopted son.

Ramabai appealed to the Privy Council.

P.C.
Ramabai
v.
Harnabai.

Narasimham, for the appellant. The decrees of the Indian Courts are wrong. Leprosy, as an incurable disease, is a disqualification by Hindu Law, and a leper loses all his rights to property. The deceased Narayan, admittedly a leper, lost his rights in the property before his son Vishnu died in 1913. Ramabai, as widow of the last male holder, is entitled to succeed to the suit properties: and the adoption of Puranik, even if true, cannot confer any right on him to the suit properties, as the adoptive father was himself incapacitated from holding property or adopting a son : *Ananta* v. *Ramabai* (1) *Janardhan Pandurang* v. *Gopal* (2) *Muttuvelayuda Pillai* v. *Parasakti* (3) ; *Bhoobunessuree Debia* v. *Gouree Dass Turkopunchanun* (4) *Mohunt Bhagaban Ramanuj Das* v *Mahunt Raghunundun Ramanuj Das* (5); *Ranchod Narayan* v. *Ajoobai* (6) *Kayarohana Pathan* v. *Subbaraya Thevan* (7) were referred to.

De Gruyther and Parikh, for Puranik, were not called upon.

The Judgment of their Lordships was delivered by

Lord Shaw :—The case for the appellant has been stated with admirable clearness and brevity by his counsel, but their Lordships do not think it necessary to call for any argument for the respondents. Lord Shaw.

This is an appeal from a decree of December 5, 1918, of the High Court of Judicature at Bombay, which affirmed a decree dated November 1, 1916, of the Court of the Additional First Class Subordinate Judge at Poona.

The only question submitted to the Board, and now subsisting, is as to the condition of body, and possibly of mind, of one Narayan Mawal. The appellant maintains that Narayan Mawal was so afflicted with leprosy as to deprive him of the position of being joint owner of certain family property, and, secondly, to deprive him of the ability to make a valid adoption of a son. His natural son had died, and the adoption was made

(1) (1877) I. L. R. 1 Bom. 554.
(2) (1868) 5 B. H. C. R. (A. C. J.) 145.
(3) (1860) S. D. A. Mad. 239.
(4) (1869) 11 W R. 535.
(5) (1895) L. R. 22 I. A. 94.
(6) (1907) 9 Bom. L. R. 1149.
(7) (1913) I. L. R. 38 Mad. 250.

P.C.
Ramabai v. Harnabai
Lord Shaw.

a few weeks before his death. Had Narayan not been a leper, this natural and proper act could not have been challenged.

In the opinion of the Board, no question of fact arises on this appeal. It appears to be definitely concluded by both of the Courts below, which both concur in their findings. The High Court in terms expresses approval of the decision of the Court of first instance; and the decision of the Court of first instance is to the effect that Narayan Mawal was not so crippled or disabled by bodily infirmity or deformity as to cease to be a useful member of society, capable of holding and enjoying property. Their findings show that, although he was afflicted with a certain type of leprosy, it was a type not very apparent except to minute inspection, and certainly a type which did not unfit him for performing both social and religious duties in company with others.

In these circumstances, the law of the case is attacked by appellant's counsel, but the law of the case may be stated to have been well settled in India for very many years. In the case of *Kayarohana Pathan* v *Subbaraya Thevar* (7) a joint Judgment of Benson and Sundara Aiyar, JJ. concludes with the following proposition :—

" Deformity and unfitness for social intercourse arising from the virulent and disgusting nature of the disease would appear to be what has been accepted in both the texts and the decisions as the most satisfactory test."

In the case of *Mohunt Bhagaban Ramanuj Das* v *Mohunt Raghunundun Ramanuj Das* (5) Sir Richard Couch delivered a Judgment of this Board which substantially agreed with that test. Sir Richard Couch was already deeply committed on the subect, for, so far back as the year 1868, in the case of *Janardhan Pandurang* v *Gopal* (2) he had expressed himself in nearly similar terms.

The result is that their Lordships will humbly advise His Majesty that this appeal be disallowed with costs.

Solicitors for appellants *T. L. Wilson & Co.*

Solicitor for respondent No. 2: *Edward Dalgado.*

A. D. M. *Appeal dismissed.*

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(7) (1913) I. L. R. 38 M. 250 (5) (1895) L. R. 22 I. A. 94.
(2) (1868) 5 B. H. C. R (A C. J.) 145.

PRIVY COUNCIL.

PRESENT: —LORD SHAW, LORD BLANESBURGH, MR. AMEER ALI AND LORD SALVESON.

(On appeal from the Madras High Court.)

Malraju Venkata Ramakrishna Rao Garu and another (*Plaintiffs'*) *Appellants.*

v.

Koppuravuri Sriramulu and 55 others. (*Defendants*) *Respondents.*

P.C.

Malraju Venkata Ramakrishna Rao Garu *v.* Koppuravuri Sriramulu.

Limitation Act (IX of 1908) First Schdule, Art. 141--Suit brought within 12 years of death of Hindu widow of ancestor for recovery of possession—Mode of proof of certificate of death—Observations on register of purohit—Finding of fact by trial judge reversed by Court of Appeal.

The appellants (Plaintiffs)) sued the respondents (defendants) in the Court of the Subordinate Judge, Guntur, for the recovery of possession of certain ancestral property after the death of the widow. The respondents pleaded that the suit was barred by limitation, the widow having, according to them, died in 1895, more than 12 years prior to action brought, and not, as alleged by the appellants, in 1898. The principal evidence in support of the appellants' case was a private register purporting to be kept by the *purohit* and his son in the ordinary course of their business, giving the dates of the anniversaries of his various clients, and among them, of the said widow as 14th December 1898 The Subordinate Judge in his findings held that, though the entry wrongly gave the family name of the deceased widow as "*Katikineni*" instead of "*Malraju*", and appeared to be in a different ink to that of other adjacent entries, both the book and the entry constituted genuine records. On appeal, the High Court of Judicature at Madras upon inspection held the book and the entry to be unreliable, and reversed the judgment and decree of the Subordinate Judge.

Held, by the Judicial Committee of the Privy Council that the register was not of such a character as to enable them to pronounce affirmatively that the entry in question was made in 1898, and in the ordinary course of business of the *purohit.*

Judgment of the High Court of Madras affirmed.

Appeal from a Decree and Judgment of the High Court of Judicature at Madras, reversing a Decree and Judgment of the Additional Temporary Subordinate Judge of Guntur.

One Malraju Venkatarama Lakshmirayanim Garu died possessed of certain landed property. His widow (Lakshmi Papamma Rao) who inherited the property, then went to live with her brother. Katikineni Venkatarayamma Naidu, at Venkatagiri. She alienated the property in various parcels, and the respondents thenceforward were in possession. The widow died, according to the appellants, on the 14th December 1898 but according to the respondents, on the 11th November 1895. On the 10th December, 1910, the first appellant and the

P.C.

Malraju Venkata Ramakrishna Rao Garu v. Koppuravuri Sriramulu.

husband of the second appellant instituted the present suit in the Court of the Temporary Subordinate Judge at Guntur against the respondents for recovery of possession of the properties, with mesne profits thereof for 3 years before suit, damages and interest, alleging *inter alia* that they (the plaintiffs) as the nearest reversioners of the estate of Malraju Venkatarama Lakshmirayanim Garu, were entitled to succeed thereto on the death of his widow, Lakshmi Papamma Rao, whereas the respondents had been in wrongful possession, and, in spite of repeated demands, had refused to surrender up the same and that, even if they claimed possession under some right derived from the widow, the plaintiffs' right to possession upon the widow's death was paramount. On the 27th June 1911, the several respondents filed their written Statements, all raising in substance identical defences to the suit: They pleaded that the widow died on the 11th November 1895 (and not, as alleged by the appellants on the 14th December 1898), and that the suit was, therefore, barred by limitation; further, that the plaintiffs were not the reversioners to the widow, that she had alienated the various properties for her maintenance and the discharge of debts, and that such alienations, having been made for good and proper consideration and by legal necessity, were binding on the reversion. On the 2nd July 1913, the first appellant died, and the second appellant was thereupon substituted on the record as his legal representative.

Several issues were framed for trial, of which the material ones are—

"(1) Whether the plaintiffs are the reversioners of the late Malraju Lakshmi Papamma Rao Garu?

(2) Whether the suit is in time?"

In the course of the trial before the Additional Temporary Subordinate Judge (S. Ranganada Mudaliar, Esq.) on the 14th July 1914, the *purohit* of Venkatagiri, who was called as a witness for the appellants, produced in evidence a book (Exhibit G.) containing the dates of the anniversaries of the various clients, and the following entry therin made by his son was proved—

"1 mark.

Margasira Sudham.

"Suddha 8, Katikineni Lakshmamma's husband of (torn) Gotras (scored out).

Suddha 11, Guruvagam Venkatra (torn).

Suddha 11, Julagam Vengamma Naidu's Tithi Pethuru.

"Vilambi Suddha 1, (14th December 1898), Katikineni Lakshmamma's Tithi (anniversary of the death).

"*Tithi* of—Lakshmamma Garu, daughter of Pittapuram Chinnayya Garu on 9th Margasira Suddha of Plava year.

"*Tithi* of Venkata Papamma on 9th Margasira Suddha of Plava year.

"Tithi (?) of Chengamma, wife of Iganti Chinna Subbayya (torn) Kotagiri, of Visalalotra, on 13th Margasira Suddha of Plava year.

"Tithi of Ramamma, mother of Ruvela (?) Changama Naidu on 4th Margasira Suddha of Sadharana year."

The respondents challenged this evidence as being false, irrelevant and hearsay, and contended that the entry in the book was a subsequent interpolation. They called rebutting evidence in two witnesses to prove that the widow died in or about November 1895; and they endeavoured to procure, without avail, the register of deaths for 1895.

On the 10th August 1914, the said Subordinate Judge delivered his judgment, holding that the plaintiffs were the nearest reversioners of the widow (Lakshmi Papamma Rao Garu), that the suit was brought within 12 years of her death in 1898, as shown by the evidence of the *purohit* and his register, and, therefore, was not barred: and he, therefore, passed a decree as prayed for by the plaintiffs, except with regard to two lots of land, which he held to be the separate estate of the widow. On the particular issue as to the date of death of the widow and the question of limitation, he remarked as follows.—

"The issue as to limitation depends upon the date of Papamma Rao's death. According to both parties, she died in her brothers house at Venkatagiri. Plaintiffs say she died on 14th December 1898. But defendants assert that she died on 11th November 1895. At that time. there were no death registers maintained at Venkatagiri except by the *Karnam*. Plaintiffs applied to the Deputy *Tahsildar* for copies of the death registers of both 1895 and 1898 as soon as the written statement was filed in this Court. The *Karnam* reported that the register of 1898 was not forthcoming. The copy of the register shows that, on 11th November 1895, there was no entry of the death of that lady: Exhibit G is a memorandum made by the family *purohit* of Katikineni Venkataramayya, Papamma Rao's brother, that she died on Vilambi Margasira Sudha 1 P. The *purohit* proves the book, but the particular entry was made by his son. It was commented on the entry that even the family house name of Papamma Rao was not known to him who has entered it as "*Katikinani*" instead of "*Malraju*"; and that the entry of

P.C.

Malraju Venkata Ramakrishna Rao Garu *v.* Koppuravuri Sriramulu.

death appeared to be a recent interpolation. People attempting such a spurious entry would be careful about a mistake of that kind, and they were hardly likely to make use of a bright blue ink. Another comment was that the next line appertaining to a succeeding year indicated a subsequent interlineation. An inspection under the glass, however, shows just the reverse, I feel certain that the book and the entry are genuine.

"The only evidence contra is that of the dismissed constable whose coolly says that he saw her die at Venkatagiri on the last Monday of *Karthikam* of 1895. I find that the suit is within 12 years of the lady's death, and is not barred."

Against this decree, the defendants in the suit appealed to the High Court at Madras (Wallis, C. J., and Srinivasa Aiyangar, J.) who on the 15th September, 1915; allowed the appeal, reversed the decree of the Subordinate Judge, and dismissed the Plaintiffs' suit, holding on the grounds set forth below, that the plaintiffs had failed to establish that the suit had been instituted within 12 years of the widow's death.—

"There is a question as to whether the suit is barred, and we think we can dispose of the case on that point. It is necessary admittedly for the plaintiffs to show that the suit was brought within 12 years of the death of the widow of one Venkatarama Lakhmi Narayanim Garu. The suit was brought on the 10th December 1910, and the case for the plaintiffs is that the widow died on the 14th December 1898, within 12 years by 4 days. It is for the Plaintiffs to prove this, and we are unable to agree with the conclusion arrived at by the Subordinate Judge that they have done so. The 2nd witness, who is the Plaintiff's brother, gives some vague evidence that he remembers hearing about 1898 that the widow had died then, but we are not prepared to rely upon his memory. The more important evidence was that of the 4th and 5th witnesses, the *purohit* and his son, and a sort of register (Exhibit G) which they produce. According to their evidence in Manmatha, which corresponds to 1895, the 4th witness opened a fresh list of anniversaries, if I may call it so, that is to say, a list of the names of certain deceased persons according to the dates when their annual ceremonies would occur. This he is supposed to have prepared in the ordinary course of business with a view to his being engaged to perform the ceremonies when the time came round. Now, in this book we find on one page at the top an entry of the *thithi*, or date of the anniversary. of the deceased husband of the widow who had died a very long time before. When the widow died, there would be no further occasion for performing that ceremony and so we find that entry has been struck out The evidence of the 4th and 5th witnesses is that after the *karmanthram* of the widow, i. e., 15 or 16 days after her death. the 5th witness, in the ordinary course of business, entered her *thithi* or date on the same page of this book, so as to remind them in future when her anniversary came round. Now, there are four other lines, including the husband's name, above this entry, and, underneath it, there are several entries entered in chronological order according to the dates of the death of the persons whose names are entered. If the entry of the widow's *thithi* had been made in the ordinary course of business, we should expect to find it entered in the same way as the other entries, whereas it may be said to be an obvious interpolation The widow's death, took place in the year *Vilambi* (1898) according to the plaintiff's case, whereas the death which are entered underneath it took place 2 or 3 years later in two cases the year of the death is

P. C.

Malraju Venkata Ramakrishna Rao Garu *v.* Koppuravuri Sriramulu

given as *Prava*. but the only year named at all corresponding to it is *Plava* and we have no doubt that Prava was the way in which the *Purohit* entered *Plava* and *Plava* corresponds with the year 1901. According to the Plaintiffs case (evidence of the Plaintiffs' witnesses 4 and 5) when the entry now in question in green ink was made, there were no entries at all below. If that had been so, the entry would not have been as it now is. The spacing itself shows almost conclusively to our minds that the entry is an interpolation. We are not prepared to act upon it or upon the evidence of these *Purohits*. The Subordinate Judge has relied mainly upon this document. Exhibit G. which we think is not reliable, and in the result we find that the plaintiffs have failed to show that the suit was instituted within 12 years after the widow's death, and accordingly we must reverse the decree of the lower Court and dismiss the suit with costs throughout."

The plaintiffs thereupon appealed to the Privy Council.

Narasimham for appellants.—The High Court in Madras erred in reversing the findings of the trial Judge on a question of fact. The trial Judge examined the *purohit's* register (Exhibit G) aud saw the *purohit* and his son, the writer of the entry in it, and his finding as to their veracity or the authenticity of their record should not be lightly disturbed. These witnesses and Exhibit G definitely establish the date of the death of the widow as the 14th December 1898, whereas the respondents' case, that she died 3 years earlier (11th November 1895), was positively disproved at the trial, and their case does not set up that the widow died on any other date.

Parikh, for respondents, was not called upon.

15th Feb, 1924. The Judgment of the Board was delivered by

Lord Shaw.—The Board does not think it necessary to call upon Counsel for the respondents.

Their Lordships in the present case think that no necessity is laid upon them to enter into any details of fact.

The entire question for determination between the parties to the appeal is whether this suit is barred by limitation. And the settlement of that question depends upon the fixture of the date of the death of a certain widow called Lakshmi Papamma Rao Garu.

The appellants who seek to dispossess the respondents maintain that this widow died in the year 1898, on a date four days within the lapse of 12 years prior to the initiation of the suit, whereas the respondents have maintained successfully before the High Court that that fact has not been established.

P. C.

Malraju Venkata Ramakrishna Rao Garu v. Koppuravuri Sriramulu.

It is admitted that the onus of proving this averment rests upon the appellants. The respondent's own averment on the subject is that the lady died about three years before, namely, in November, 1895.

Has it been satisfactorily proved that this lady died in 1898? In their Lordships' opinion, it has not been proved. They have gone out of their way themselves to look at the important item of documentary evidence which the appellants produced an alleged private register in which the crucial entry is apparently interpolated among faded brown entries and is in bright blue ink. The inspection of documents confirms their opinion, concurring with that of the High Court, that the register is not of such a character as to enable them to pronounce affirmatively that the entry in question was made at the date alleged. And in short, without entering into details of the case, their Lordships are not satisfied that the High Court have come to any erroneous conclusion upon the primary and radical fact in this case namely the date of this lady's death.

In these circumstances, they will humbly advise His Majesty that the apeal should fail, and that the appellants should be cast in the costs thereof.

A. D. M.

Appeal Dismissed.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

(On Appeal from the High Court of Judicature at Madras.)

Nainapillai Marakayar (Since deceased) and others — *Appellants*

v.

Ramanathan Chettiar and others — *Respondents.*

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

Madras Estates Land Act, S. 3(2) (d), Estate--Religious Endowment--Temple —Property granted to, if and when an estate—Grant—Construction—Grant of melwaram only or of kudiwaram also—Ejectment suit by temple against tenant of endowed lands—Permanent right of occupancy—Tenant's claim to—Proof—Onus—Quantum—Presumption of grant of permanent right of occupancy by Shebait in endowed property--Permissibility--Grant of permanent right of occupancy by trustee of temple in endowed lands—Validity—Binding nature of, on

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

his successors—Endowed property of temple—Permanent right of occupancy in—Presumption—Grounds of—Description of tenant as Kudimiras Alienation by tenants to knowledge of temple officials— If sufficient to raise presumption—Temple—Juridical person—Trustee of temple—Alienation of endowed property—Validity—Conditions—Permanent tenancy—Creation—Power of—Improper alienation by trustee—Suit by him to set aside—Maintainability—Estoppel—Permanent right of occupancy—Origin, nature and incidents of—Claim to such right in ejectment suit by Landlord against tenant—Onus of proof—Acquisition of permanent right of occupancy by tenant aginst landlord—Impossibility of—Words—Kudi, Miras, Kudimiras—Kudiwaram or Kudiwaram interest—Ekabhogam ; Arudikaries, Samudayam—Pazhangaries — Meaning of.

When a tenant of lands in India in a suit by his landlord to eject him from them sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant.

A permanent right of occupancy in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature.

"Kudiwaram" is a Tamil word, which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent, which is sometimes designated "melvaram." The Kudiwaram or kudiwaram interest, as it is called in S. 8 of the Madras Estates Land Act, is in fact a species of tenant right or right of permanent occupancy. "Rokkaguthagai" means an assessment, also fixed at favourable rates, either from favour or as an inducement to reclaim waste.

A public temple is a religious institution, and is recognised in law as a juridical person, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority

The position of the Shebait, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analoguos to the position of a mahant of a math to deal with the endowed lands of the math. Except in a case of an actual, special, and unavoidable necessity of the temple, the Shebait, the managers or the trustees of a temple have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one rights of permanent occupancy in the endowed lands.

In the case of a Shebait a grant by him in violation of his duty of an interest in endowed lands which he has not authority as shebait to make may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors.

To create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

rent from time to time, would be a breach of duty in a Shebait. In the case, therefore, of land which was debutter at the time the tenancy originated, the presumption of a permanent tenancy is not permissible.

When a tenancy in the Presidency of Madras commences under a terminable contract there is nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him.

No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands.

The trustees of a temple sued for the ejectment of the defendants from lands including groves, in the Tanjore District. The suit lands were part of the endowed property of the temple, and the defendants were admittedly tenants of the temple suit lands. The defendants alleged that the kudiwaram rights in the suit lands were vested in them and never were vested in the temple, and they claimed that they had permanent rights of occupancy in the lands under S. 6 of the Madras Estates Land Act, and also independently of that Act.

The village, in which the suit lands were situated, was at some time before 1723 granted by a Raja of Tanjore, and re-granted in 1723 by the then Raja of Tanjore, to the temple.

Held, on a construction of the Sanad of 1723 and in the circumstances of the case, that the melwaram and the kudiwaram interests in the lands of the village were conveyed to the temple, that the suit lands were not an "estate" within the meaning of the Madras Esates Land Act, and that the defendants were not, under that Act or otherwise, tenants with a permanent right of occupancy.

Their Lordships declined to presume that the defendants or those through whom they claimed had acquired rights of permanent occupancy from (1) the fact that in some receipts given by servants of the temple tenants of endowed lands in the village had been described as "kudimiras," and (2) the fact that tenants of the endowed lands had to the knowledge of officials of the temple sold or mortgaged such interests as they had in endowed lands of the village.

Meaning of "Kudi," "Miras," and "Kudimiras."

Classes of villages in the District of Tanjore known as "Ekabhogam," "Arudikaris," "Samudayam" or "Pazhankaries."

Consolidated Appeal (No. 46 of 1922) by special leave from two decrees (December, 22, 1916) of the High Court, affirming two decrees (April 24, 1914) of the Subordinate Judge of Tanjore.

For the full report of the judgment of the High Court (Sadasiva Aiyar and Napier, JJ.) see 33 M. L. J. 84.

Sir George Lowndes and *K. V L. Narasimham* for the appellant.

P. C

Nainapillai Maraka yar v. Ramanathan Chettiar

Sir John Edge

De Gruyther K. C. and *Kenworthy Brown* for the respondents.

Dec. 14. The Judgment of their Lordships was delivered by

SIR JOHN EDGE.—These are two consolidated appeals by defendants or their representatives from decrees, dated December 22, 1916, of the High Court at Madras, which dismissed two appeals from decrees, dated April 24, 1914, which a Subordinate Judge of Tanjore had made in original suits 40 and 42 of 1913 in favour of the plaintiffs for the ejectment of the defendants from lands, including groves, in Tanjore and for mesne profits.

The plaintiffs in each of the suits were five of the six trustees of the Mantrapureeswarasami Temple in Kovilur, in Tanjore. That temple will hereafter be referred to as "the temple." The sixth trustee, who was made a defendant in each suit, did not interfere in the conduct of the suits. It will be understood that when later in this Judgment the defendants are referred to, the reference is to the defendants other than the sixth trustee.

The lands in respect of which a decree of ejectment has been made in each suit are part of the village of Mangal in Tanjore, and are part of the endowed property of the temple. It is not disputed that the defendants were tenants of the temple lands to which the suits relate, nor is it now disputed that they received notices to quit. The defendants admit that the melvaram rights in the property in question are vested in the temple, but their case is that the kudivaram rights in that property are vested in them and never were vested in the temple, and they claim that they have permanent rights of occupancy in the lands under S. 6 of Madras Act 1 of 1908, and also independently of that Act.

It cannot now be doubted that when a tenant of lands in India in a suit by his landlord to eject him from them, sets up a defence that he has a right of permanent tenancy in the lands, the onus of proving that he has such right is upon the tenant. In *Secretary of State for India* v. *Luchmeswar Singh* (1) it was held that the onus of proving that they had a permanent right of occupancy in lands was upon the defendants, who alleged it as a defence to a suit by their landlord to eject them,

1. (1890) L R 16 I A 6 : 16 C 233 (P. C.)

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

Sir John Edge

and that proof of long occupation at a fixed rent did not satisfy that onus; and in *Seturatnam Aiyar* v. *Venkatachala Gounden* (2), in a suit by the landlord for the ejectment of the defendants from lands in a ryotwari district in Madras, the giving of notice to quit not being disputed, it was held that the onus of proving that the defendants had rights of permanent occupancy was upon them.

A permanent right of occupancy in land in India is a right, subject to certain conditions, of a tenant to hold the land permanently which he occupies. It is a heritable right, and in some places it possibly may be transferable by the tenant to a stranger. That permanent right of occupancy can only be obtained by a tenant by custom, or by a grant from an owner of the land who happens to have power to grant such a right, or under an Act of the Legislature. No custom by which the defendants could have obtained a right of permanent occupancy is alleged or proved in these suits.

Their Lordships will first consider whether the defendants have proved that they have rights of permanent occupancy under Madras Act I of 1908 in the lands in suit, and then whether they have proved that they have otherwise than under that Act rights of permanent occupancy in the lands.

Unless the endowed lands of the temple in the village of Mangal constitute an "estate" within the meaning of that term in Madras Act I of 1908, that Act does not apply to them, and the defendants are not tenants with a right of permanent occupancy under S. 6 of the Act. An "estate" is defined by S. 3 of the Act, which so far as it is material in this case is as follows "3. In this Act, unless there is something repugnant to the subject or context: (2) 'Estate' means (d) any village of which the land revenue alone has been granted in inam to a person not owning the kudivaram thereof, provided that the grant has been made, confirmed, or recognised by the British Government, or any separated part of such village;"

The term "kudivaram" is not defined in the Act, but, as was explained by the Board in *Suryanarayana* v. *Patanna* (3). "kudivaram" is a Tamil word, which signifies a cultivator's share in the produce of land as distinguished from the landlord's share in the produce of the land received by him as rent,

2. (1920) L R 47 I A 76 : 43 M 567 : 38 M L J 476 (P. C.)
3. (1918) L R 45 I A 209 : 41 M 1012 : 36 M L J 585

which is sometimes designated as "melvaram" see also *Upadrashta Venkata Sastrulu* v. *Divi Seetharamudu* (4) where it was mentioned by the Board that the "kudivaram" or "kudivaram interest," as it is called in S. 8 of the Act, is in fact a species of tenant right or right of permanent occupancy.

It is the plaintiffs' case that the village of Mangal, including the melvaram and kudivaram rights in it, was at some time before 1723 granted as an endowment to the temple by the then Raja of Tanjore, subject to a yearly payment in cash to the Raja, part of which he remitted to the temple as an allowance for the maintaining of puja at the temple. The grant, or sanad, has been lost. The Raja of 1723 had recalled the grant, but had continued the cash allowance to the temple. In 1723 the managers of the temple complained to the then Raja of Tanjore that the allowance in cash was insufficient to maintain the puja at the temple, and thereupon the Raja granted to the temple a sanad which as translated is as follows "Rokha Dafter Karkoon. Ta : (Talus) Kovil Kottay (illegible) Kadoorambh. On Thursday thirtieth Vaisak Bahoolam Sobhankruth Samvatsar, Soorsan year Arba Isarin Muyu Alph (1124), at Vedarania on the auspicious occasion of the solar eclipse, Tilai Naik Bhandari, residing at Vedarania came before and made a representation as follows : 'That the mohin (Allowance)—account of the Divani (Government Treasury for pooja worship) of the Devastan Kovil is very insufficient, that Nakshi Gootaga (Rokkaguthakai) village was being carried on for the Devastan from the beginning and thereby daily worship, special worship, and car-festivals used to be performed. Has been made Sanjayath. For this reason, God's worship and oochavams are not being performed as before and car-oochavams and special oochavams have remained unperformed. Hence, His Highness will be graciously pleased to permit to be carried on as before the Nakshi Gootaga village for the God and for this purpose an order should be issued.' To this effect he made a petition. Thereupon, His Highness being pleased by way of favour has ordered the Nakshi Gootaga (village to be carried on and has approved of the berji (assessment). This permission is dated .. (torn) Ramjan. From the year aforesaid the Nakshi Gootaga (Rokkaguthakai) of the Manje Mangal village including the nanja and punja lands has been given (to) Sri Buddhi-

4. (1919) L R 46 I A 123 : 43 M 166 : 37 M L J 42.

P. C.
Nainapillai Marakayar v. Ramanathan Chettiar
Sir John Edge

pradeswar Swami (of) Kovil Kottay on the annual (payment) of chakras 125—the previous gootaga (lease amount) being 100, one hundred chakras and the present increase being chakras 25—in all, chakras one hundred and twenty-five. Out of this (amount), let credit be given for chakras 72, seventy-two per year for the mohin-divani's (Government's) Mohin (allowance) for worship out of the gootaga (lease amount) and let the balance be credited in the divani (treasury) from time to time. Matters should be conducted in this way from year to year. Let a copy be taken and let the original sannad be returned to the Sthanik. Pa Hoo Pa (illegible) Hajrat Rajesri Siv Row Narsing Row Peshway. Prepared, date 1 (illegible)."

The grantee of the sannad is the temple, and the village which in the sanad of 1723 is described as the Nakshi Gootaga (rokkaguthakai) village is beyond doubt the village of Mangal. Rokkaguttaghei, another spelling of the vernacular word "rokkaguttakai," means, according to the Manual of the District of Tanjore, an "assessment, also fixed at favourable rates, either from favour or as an inducement to reclaim waste.:" See p. 487 of *A Manual of the District of Tanjore,* compiled under the orders of Government, printed at Madras in 1883.

In 1724 an official memorandum was sent to the State officer of Kadaramban, which mentioned the petition upon which the sanad of 1723 was granted and continued thus : " An arzi was therefore submitted praying that Saheb Avergal would be pleased to pass orders for continuing the rokkaguthakai village as before and thereupon an order was passed accordingly for treating Mangalam village inclusive of nanja and punja as rokkaguthakai village for Sri Budhipradeswaraswami of Kovilkottai, for 125 pons per annum. Beriz fixed therefor is as follows :—Previous guthakai, 100 pons ; increase now made, 25 pons ; total, 125 pons. It was granted for this sum. Out of this sum, 72 pons, being the annual allotment made for the Sirkar pooja mohini shall be remitted, and the balance of beriz credited to the Sirkar. This shall be followed every year. The original sannad shall be returned to the Stanikar after taking a copy thereof. (By order of Huzur.) Seal of M. R. Ry. Hazarath Siva Rao Narasinga Rao Peishwa."

There can be no doubt that the sanad of 1723 was granted ; the only question as to it is, what does it mean ?

The sanad of 1723, in their Lordships' opinion, purports to regrant to the temple all the lands of the village of Mangal as a religious endowment of the temple subject to the assessment mentioned in it, and the effect of that regrant was to pass to the temple all the melvaram and the kudivaram rights in the village. The temple had, obviously, been deriving from the village under the original sanad an income sufficient for the maintenance of the puja worship at the temple, and it must have obtained that income from the cultivation of the village lands either by its servants or by its tenants, but there is nothing in the sanad of 1723 to suggest that there was in 1723 any tenant of lands in the village who had any right of permanent occupancy in them. There is no proof that in 1723 there was any tenant of lands in the village who had any right of permanent occupancy in them. The village was in 1723 of that class of village which in Tanjore was known as "ekabhogam" villages, or villages of which the sole occupancy right was vested in one individual—in Mangal the temple —to distinguish them from "arudigarie" villages, which were held by a number of individuals in separate shares, and from "samudayam" or "pasunkarie" villages, which were held in common. As to the three classes of villages see p. 405 of the Manual of the District of Tanjore.

At some time between 1749 and 1799 the Tanjore territory in which the village of Mangal is situate came by cession from the Raja of Tanjore or by conquest under the control of the East India Company, and in 1809 a register of lands in the village of Mangal was made by Mr. Cotton as the Collector of the District. The following is an extract from his register of rokkaguthakai lands :—

Nature of the Sannad.	Names of the grantors.	Names of the original grantees	Name of the present possessor.	Relationship of the present possessor to the original grantees.	Date of the original sannad.	Names of the villages or portions of villages comprised in the grant.	Nature and extent of the land so granted.	Amount of the revenue	
								Nanja, Punja and Bagayat.	Total.
2	3	4	5	6	7	8	9	10	
Dufter Rogah directing that the village Mangalam be held every year by Munderapureesvaraswami Covil in Covilcotoy, liable to the fixed annual money rent of 125 chakrams and specifying that Tillainayaga Pandaram at Vedaraniem has on the day of Sun eclipse represented that the Mohini hitherto allowed by the Sirkar to the said Pagoda is very small, that it had formerly enjoyed that Rokkaguthakai village which afforded them the means of performing its daily and coach ceremonies, etc., which being since resumed under amani, the performance of these ceremonies ceased and that as he therefore requests the restoration of the said village, it is now accordingly made one to the said Pagoda liable to the increased annual rent of 125 chas. instead of the 100, formerly levied thereon and that after deducting from the said 125 chakrams the mohini of 72 chakrams allowed by the Sirkar, the remainder is to be payable by the said pagoda.	Unknown.	Mundera pureesvaraswami Coil.	Mundera-, pureesvaraswami Coil	The village is enjoyed by the said Pagoda ever since this Rogah was granted.	Of Arban Glesarson Myulut—Date—(illegible) in this sannad.	The village Mangalam in Mannargudi Taluk, (is) consisting of 10 velis of nanja and 15 velis of punja as mentioned in the Palace account, but the said pagoda actually enjoys velis 37 M 3 and G 12½ of nanja. Velis 43, M. 4 and G. 62½ of punja and velis 16, M. 11 and G. 15 of poramboke composing the whole of that village.	Total Bagayat 25 0 0 Punja 15 0 0 10 0 0 Nanja.		Rs. A. P. 125 0 0

The entry in column 4 shows that the village had been originally granted to the temple, and the entries in columns 5 and 6 show that, according to the Collector's information, the village had been enjoyed by the temple from the time of the original grant down to the time when he made the register in 1809. The entries in columns 2 and 8 show that, according to the Collector's information and belief, all the lands of the village had been granted to the temple. Their Lordships regard the entries in the register of 1809 relating to the village of Mangal as valuable as showing what on the information which he had obtained, the Collector believed to be the title to the village of Mangal and to all the lands in that village.

In the paimash, or survey account, for fasli 1226 (1816 or 1817), the person then in the enjoyment of the total nunja (dry land), punja (wet land), tope and manai garden, of the village of Mangal was stated to be the temple, and the enjoyment was stated to be " rokkaguthagai ekabhogam. " In the paimash for fasli 1238 (1829), village of Mangal was described as a " rokkaguthagai miras ekabhogam village, " which meant that it was a rokkaguthagai village and that all the lands in the village were the property of one proprietor.

It is stated in the Judgment of the High Court—and it must be assumed correctly—that 21 velis of the wet land of the village of Mangal were cultivated by the temple, by its servants and with its own ploughs, before 1820, and that in those 21 velis of the endowed lands the temple then owned both melvaram interest and the kudivaram interest, and the defendants were unable to explain how it happened that the temple could have owned the kudivaram interest in 21 velis only of the endowed lands.

It was proved that in 1883 a small area of the waste lands of the village of Mangal was acquired by the Government under the Land Acquisition Act, and that no part of the compensation paid for those waste lands was claimed by any person except the temple, and that to the temple was paid all the compensation awarded under that Act. From that fact it may be concluded that the grant of the lands in the village in 1723 included the waste lands of the village, if there could be any doubt that all the lands of the village of Mangal were granted by the sanad of 1723 to the temple as an endowment.

Their Lordships find that the melvaram and the kudivaram interests in the lands of the village of Mangal were at

P. C.
Nainapillai Marakayar v. Ramanathan Chettiar
Sir John Edge

some time before 1723 granted by a Raja of Tanjore, and re-granted in 1723 by the then Raja of Tanjore, to the temple, and consequently, that the lands in suit are not an "estate" within the meaning of Act I of 1908, and that the defendants did not obtain any rights of permanent occupancy under that Act.

It remains to be considered whether the defendants have proved that they, or those through whom they claim title as occupiers of the lands in suit, obtained at any time a right of permanent occupancy in the lands. No grant of a right of permanent occupancy has been produced. But the defendants asked the Courts below, and now ask their Lordships, to presume that they or those through whom they claim, were tenants of those lands in suit with a right of permanent occupancy in them. It does not appear that in 1723, or in 1809, or in 1816, or in 1829, there were any tenants of lands in the village who had a right of permanent occupancy in the endowed lands of the temple. As Act I of 1908 does not apply in this case, and as there is no proof of any custom conferring on tenants of lands of the village any right of permanent occupancy, and as no grant of a right of permanent occupancy has been produced or even alleged, it is not apparent how that right could have been obtained by the defendants or by any predecessor in titles of theirs, except by a lost grant or grants, and that is not even suggested.

A public temple, such as is the temple in this case, is a religious institution, and is recognised in law as a juridical person,, but it can act only through persons who have authority to act for it, and they can act for the temple only within the scope of their authority. The position of the shebait, the manager or the trustees of a temple, is, so far as their power to deal with the endowed lands of the temple is concerned, analogous to the position of a mahant of a math to deal with the endowed lands of a math. They can doubtless sell or mortgage the endowed lands of the temple if there is an actual, special, and unavoidable necessity of the temple to do so, but that necessity would have to be proved by those who alleged that it existed. Except in a case of such unavoidable necessity the shebait, the manager or the trustees of a temple, or the mahant of a math, have no power to sell or mortgage the endowed property in their custody, and obviously they have no right to impair the endowed property by creating or granting in favour of any one

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

Sir John Edge

rights of permanent occupancy in the endowed lands. The law on this subject is well established : see *Shibessouree Debia* v. *Moothooranath Acharjo* (5) ; *Abhiram Goswami* v. *Shyama Charam Nandi* (6) *Palaniappa Chetty* v. *Deivasikamony Pandara* (7) ; *Vidya Varuthi Thirtha* v. *Balusami Ayyar* (8). In the case of a shebait a grant by him in violation of his duty of an interest in endowed lands which he has not authority as shebait to make may possibly under some circumstances be good as against himself by way of estoppel, but is not binding upon his successors.

In *Satya Sri Ghose Lal* v. *Kartik Chandra Dass* (9), which came before the High Court at Calcutta in second appeal in a suit to eject the defendants from debutter lands, which the lower appellate Court had dismissed on a presumption that the defendants had a permanent tenancy in the lands, Sir Lawrence Jenkins, C. J. and Chatterjee, J. said that the decree appealed from rested not on direct proof but on presumption, and that it would seem that the property there in question was debutter, and remanded the suit so that it might be ascertained if that property was debutter when the tenancy commenced, holding, rightly, that "The presumption in favour of a permanent tenancy implies that there is ground for inferring that the tenure was always intended to be and always was hereditary, or that it acquired that character by subsequent grant. But a presumption in favour of a transaction assumes its regularity ; it cannot be made in favour of that which offends legal principles."

They further rightly said "If it was debutter at the time the tenancy originated, then this would affect the applicability of the presumption, for, to create a new and fixed rent for all time, though adequate at the time, in lieu of giving the endowment the benefit of an augmentation of a variable rent from time to time, would be a breach of duty in a shebait and is not therefore presumable."

In the present case there was nothing proved, or even attempted to be proved, from which it could be inferred that the tenure of tenants of the lands in suit, or of any lands in the endowed property of the temple, had originally been a tenure

5. (1869) 13 M I A 275. 6. (1909) L R 36 I A 148 : 36 C 1003.
7. (1917) L R 44 I A 147 : 40 M 709 : 33 M L J 1
8. (1921) L R 48 I A 302 44 M 831 : 41 M L J 346 (P. C.)
9. (1912) 15 C L J 227.

P.C.

Nainapillai Marakayar v. Ramanathan Chettiar

Sir John Edge

of permanent occupancy or any higher tenure than that of a tenancy at will. Between 1820 and 1830 some of the endowed lands in the village of Mangal were let by the temple for cultivation on short leases of from one to five years ; such leases were granted to the highest bidders. In 1831 some of the tenants of the temple's endowed lands, apparently all of them, agreed amongst themselves to cultivate jointly the endowed lands of which they were tenants, and they executed and delivered to the Collector, who was then the manager of the temple and its endowments, a muchilika by which they took the endowed lands for a term from fasli 1241. That muchilika is absolutely inconsistent with any of the tenants having then any right of permanent occupancy in any of the endowed lands of the temple and with their believing that they had any right of permanent occupancy in any of the temple's lands. In 1870, Sir C. H. Scotland, C. J. held that when a tenancy in the Presidency of Madras commenced under a terminable contract there was nothing to prevent the landlord from ejecting the tenant at the end of the term from the lands which had been let to him : see also *Mayandi Chettiyar* v. *Chokkalingam Pillay* (10).

One of the reasons for these consolidated appeals as stated in the case for the appellants is

4. Because the appellants have acquired permanent occupancy right by prescription. " No tenant of lands in India can obtain any right to a permanent tenancy by prescription in them against his landlord from whom he holds the lands : see *Madhava Rao Waman Saundalgekar* v. *Raghunath Venkatesh* (11).

Another reason for these consolidated appeals as stated in the case for the appellants " 5. Because the respondents having allowed and recogniesd the alienations made by the predecessors of the appellants, are now estopped from denying that they have permanent rights of occupancy. " The appellants' case, that they have permanent rights of occupancy, was not argued on the ground of an estoppel, for there is no estoppel on the evidence in the case, but on the ground that it must be presumed, from matters which will be presently referred to, that the defendants, or those through whom they claim titles as tenants, had at some time acquired rights of permanent occupancy in the lands in suit.

10. (1903) L R 31 I A 83 : 27 M 291 (P. C.)
11. (1923) L R 50 I A 255 : 47 Bom 798 (P. C.)

P. C.

Nainapillai Marakayar v. Ramanathan Chettiar

Sir John Edge

In the very able argument which was addressed to their Lordships in support of these consolidated appeals it was contended that their Lordships ought to presume that the defendants or those through whom they claim had acquired at some time rights of permanent occupancy in the lands in suit from the fact that in some receipts given by servants of the temple tenants of endowed lands in the village were described as "kudimiras." Their Lordships are not certain what in Tanjore "kudimiras" means. No doubt by itself "miras" generally means a proprietor of some kind, and "kudi" by itself appears to mean a house, a village, a town, an inhabitant, or a tribe. "Kudimiras" in those receipts may have been a description of the tenant as the proprietor of a house in the abadi of the village, or it may have been a misdescription. It appears from one paimash that there were men who were described as "kudimiras" in respect of their interests in houses in the abadi of the village. In *Mayandi Chettiyar* v. *Chokkalingam Pillay* (10) already cited, the Board declined to act on a vernacular descriptive term of parties in that case, which the Board considered as being of uncertain meaning. The particular descriptive term was "ulavadai mirasidar." The appeal in that case related to lands in Tanjore. Also, in support of the argument that their Lordships ought to presume that the defendants had a right of permanent occupancy in the endowed lands, many other documents and papers were relied upon as showing that tenants of the endowed lands had to the knowledge of officials of the temple sold or mortgaged such interests as they had in endowed lands of the village of Mangal. Their Lordships are unable to make any such presumption. Such a presumption would mean that some managers or trustees of the temple had violated their duty to the temple. It has not been proved that there ever were any lands in the village in which, by grant or custom, there was any right of a tenant of a permanent occupancy, and the only presumption which their Lordships can make in the cases of such sales and mortgages is that it was to the interests of the temple that the ordinary cultivators of the temple lands should be solvent persons, and not persons who were compelled to sell or mortgage such interest as they had in the lands in order to raise money.

All the documents and papers from which their Lordships have been asked by the counsel for the defendants to presume

10. (1903) L R 31 I A 83 : 27 M 291 (P C).

P.C.

Nainapillai Marakayar v. Ramanathan Chettiar

Sir John Edge

that the defendants had rights of permanent occupancy in the lands in suit were before Mr. G. Kothanda Ramanjulu, the Subordinate Judge who tried the suits, and on the appeals before Sadasiva Aiyar, J., who wrote the judgment of the High Court, with which Napier, J., concurred. All those learned Judges were, from their local knowledge, in a better position than their Lordships are to appreciate correctly the meaning of the vernacular terms in use in the Tamil country of Tanjore in reference to interests in lands, and all those learned judges, in carefully considered and exhaustive judgments, found, to state briefly their findings, that the endowed property of the temple, of which the lands in question formed part, was not an "estate" within the meaning of Madras Act 1. of 1908, and that the defendants were not, under that Act or otherwise, tenants with a right of permanent occupancy.

The appellants having failed to prove that they or any of them had any right of permanent occupancy in any of the lands in suit, their Lorships will humbly advise His Majesty that these consolidated appeals should be dismissed with costs.

Solicitors for appellants *Douglas Grant.*

Solicitors for respondent *T. L. Wilson and Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

A. R. Srinivasachariar *Appellant* (Plaintiff)*

v.

A. Raghavachariar and others .. *Respondents (Defendants and L. R. of the deceased 4th defendant).*

Srinivasachariar v. Raghavachariar

Hindu Law—Widow—Will—Legatee—Rights of—If can sue trespasser—Vacant site—Presumption as to possession.

A person who claims to be a legatee under the will of a Hindu widow bequeathing her husband's property derives no title under the will even to maintain a suit in ejectment against trespassers.

In the case of vacant sites of which no effective physical possession is feasible, the presumption is that possession will follow title.

*S A No. 578 of 1921. 25th January, 1924.

Srinivasa-chariar v. Raghava-chariar

Second Appeal against the decree of the Court of the Subordinate Judge of Chingleput in A. S. No. 20 of 1920 (A. S. No. 24 of 1920 on the file of the District Court of Chingleput) preferred against the decree of the Court of the Principal District Munsif of Chingleput in O. S. No. 298 of 1918.

M. Patanjali Sastri for appellant.

T. Narasimha Aiyangar and *S. Rangaswami* for respondents.

The Court delivered the following

JUDGMENT :—The suit site in this case was a vacant site of which no effective physical possession was feasible. In such a case, there is no doubt that the presumption is, that, when there has been no effective physical possession, possession will follow title. The lower appellate Court found in this case that plaintiff had no title, and that he had not been in possession within 12 years of suit. The decision on the question of title was one in law, and thus open to agrument in Second Appeal. As there was no very clear finding by the lower appellate Court that defendants had been in physical possession, and that therefore the presumption that possession follows title could not be called in aid on behalf of plaintiff, it was necessary to have the question of law, *i. e.*, the question of the existence of any title in plaintiff, argued.

The plaintiff claims title to the property as legatee under the will of a Hindu widow bequeathing her husband's property. It is conceded, of course, that as against a reversioner plaintiff could have no title at all, but it is argued that as against any one but a reversioner, *e. g.*, as against alleged trespassers like defendants, the will would convey a title to plaintiff. For this position a Privy Council Ruling in *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (1) is relied on ; wherein it was held that an alienee not for necessity from a Hindu widow took with his alienation sufficient title to resist or eject a trespasser. The alienation in that case was before the widow's death, and naturally is voidable, on good cause shown by the reversioners. But until the reversioners choose to attack it there is no obvious reason why the title, valid at its commencement, if not avoided, and *ex hypothesi* not yet avoided, should not remain valid until avoided. This seems to me a very different proposition to

1. (1907 I L R 34 Cal 329 17 M L J 154.

Srinivasa-chariar v. Raghava-chariar

that of holding that the Hindu widow has the power over her husband's estate of alienation after her death, that she has the right to say to any one " after my death you shall enjoy my husband's estate, " when at her death her interest in that estate and therefore her power of disposition over it came to an end. The ruling in *Durga Sundari* v. *Ramakrishna Poddar* (2) is clear authority that she has no such power of disposition whatever, and, in my view, a Bench of this Court in *Mahalakshmamma* v. *Vemi Reddi* (3), has taken the same stand point. See also *Raghava Mudaliar* v. *Narayanaswami Mudaliar* (4).

The right of a trespasser to devise his possessory title, so far as it has reached, is cited by way of analogy, but in the case of a trespasser, his estate, such as it is, is not a limited estate, and the analogy seems to me to fail.

I therefore hold that the lower appellate Court's decision on the question of title is correct. I have been urged to refer the question to a Bench, but the I. L. R. 34 Calcutta Case seems to me hardly strong enough foundation for holding that that case made any change in the law on this point as it has been up till now understood, though the interesting argument of the appellant's vakil gave a certain plausibility to his view.

As plaintiff therefore has no title, he cannot fall back on any legal possession resting solely on title, and actual physical possession by him within 12 years of suit has been negatived by the lower appellate Court. This appeal must fail.

I dismiss the appeal with costs.

T. S. V. *Second Appeal dismissed.*

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2. (1913) 18 C L J 162.

3. (1922) 44 M L J 60.

4. (1893) 4 M L J 88,

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE WALLACE.

Addepalli Venkata Gurunadha
Rama Seshayya *Appellant** (*Plaintiff*)

v.

Sri Tripurasundari Cotton Press, Bezwada, represented by the Secretary, Addepalli Venkatappayya *Respondent* (*2nd Deft.*).

Rama Seshayya v. Sri Tripurasundari Cotton Press, Bezwada

Limitation Act, Art. 116—Company—Suit for dividends—Auction purchaser of shares—Refusal by Company to register the purchase—Position of purchaser—Company if trustee—Limitation.

The purchaser at a Court auction sale of some shares in a Company belonging to a judgment-debtor applied to the Company to register his purchase, but it was refused. He then brought a suit for recovering dividends which had fallen due more than three but less than six years before the date of suit. *Held,* the suit was barred. He was not a share-holder and therefore could not take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art. 116 of the Limitation Act.

Ripon Press and Sugar Mills, Ltd. v. *Nama Venkatrama Chetty,* (1918) I L R 42 Mad 33 35 M L J 256 distinguished ; *Nagabhushanam* v. *Ramachandra Rao,* (1922) I L R 45 Mad. 537 42 M L J 449 referred to.

A Company does not hold its dividends as a trustee for the shareholders.

Second Appeal against the decree of the Court of the Subordinate Judge of Bezwada in Appeal Suit No. 22 of 1920, preferred against the decree of the Court of the District Munsif of Bezwada in Original Suit No. 112 of 1917.

T. S. Raghunatha Rao and *T S. Srinivasa Rao* for appellant.

P. Satyanarayana Rao for respondent.

The Court delivered the following

JUDGMENT :—The only question argued in this appeal is one of limitation. The plaintiff had purchased in Court-auction some shares which the judgment-debtor held in the second defendant company, and some dividends on those shares which had fallen due before the date of his purchase. The company refused to pay him the dividends and he has filed a suit for these. His suit was in 1917. One of the dividends, namely that for 1912, fell due on 11—4—1913 and the lower Courts have held that the plaintiff's suit was barred as regards this dividend, since he had not sued within three years of the dividend falling due. The plaintiff appeals.

*S A No. 593 of 1921. 14th February, 1924.

Rama Seshayya v Sri Tripurasundari Cotton Press, Bezwada

The plaintiff relies chiefly on a ruling reported in *Ripon Press and Sugar Mills, Ltd.* v. *Nama Venkatrama Chetty* (1), which lays down that a suit by a share-holder to recover dividend is covered by Art. 116 of the Indian Limitation Act, that is a shareholder gets six years within which to sue for payment of dividend which has fallen due. The rejoinder to this contention is that the plaintiff is not a shareholder, since the company has refused to register him as such. The plaintiff appeals to the ruling in *Nagabhushanam* v *Ramachandra Rao* (2) but, though that ruling no doubt lays down that a court-auction purchaser, such as he, is entitled to be registered as the owner of the shares purchased, the company still retains full discretion to refuse such registry. The plaintift then is not a shareholder and cannot therefore take his stand on the registered contractual relation which is the foundation for any claim to call in aid Art. 116 of the Indian Limitation Act.

The plaintiff however, argues that the defendant company holds dividends for shareholders in trust for them, and that, therefore, there is no period of limitation at all : but the case he himself relies on, namely, *Ripon Press Sugar Mills, Ltd.* v. *Nama Venkatarama Chetty* (1), clearly negatives this view.

He next claims that the company's accounts will show that the dividends were due and that the company has thus acknowledged its debt to his judgment debtor, but he has not chosen to file these accounts to show in what form they run or in what form the acknowledgment is embodied. The balance sheets, Exs. E series, were filed for a different purpose, namely to show when the dividends were due, and do not contain any acknowledgment specific enough to save limitation.

There is thus no proof of any acknowledgment sufficient to save limitation. The plaintiff's cause of action, for the receipt of the dividend arises, in the absence of any acknowledgment, on the date on which it fell due for payment. He cannot add to that any extended period of limitation which is applicable only to persons of a specific class as shareholders to which his judgment debtor belonged. The plaintiff takes his assignment subject to all the laws of limitation. I agree therefore that the decision of the lower Court is correct and dismiss the appeal with costs.

T. S. V. *Second Appeal dismissed.*

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1. (1918) I L R 42 M 33 : 35 M L J 256.
2. (1922) I L R 45 M 537 : 42 M L J 449.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE SPENCER.

Gothipati Suryanarayana *Petitioner** (*Petitioner.*)

v.

Sree Raja Ankineed Prasad Bahadur and others *Respondents* (*Counter Petitioners.*)

Criminal Procedure Code, S. 145—Dropping proceedings under the section—Magistrate being satisfied that no dispute likely to cause breach of the peace existed—Source of Magistrate's information immaterial—Magistrate not bound to record evidence—Sale proceeds of crops on attached lands—Whether may be ordered to be kept in deposit in Court pending an order of one party or other. Surya-narayana v. Sree Raja Ankineed Prasad Bahadur

In a proceeding under S. 145 of the Criminal Procedure Code, the Magistrate will not be acting illegally if he drops the proceedings after passing the preliminary order, if he is satisfied that no dispute likely to cause a breach of the peace existed, although in coming to the conclusion he acted on the petition of a third party to the proceedings ; and the Magistrate is not bound under such circumstances to record the evidence of the witnesses of the petitioner who might have shown by their evidence that a dispute still existed.

Manindra Chandra Nandi v. *Barada Kanta Choudhuri,* 30 Cal 112 at p. 116 and 30 Cal 161 referred to.

The sale proceeds of crops standing on the lands when the lands were attached in possession proceedings may be ordered to be kept in deposit in the Court until the one party or the other obtained an order in his favour.

12 Cr L J 104 referred to.

Petition under Ss. 435 and 439 of the Code of Criminal Procedure, 1898, praying the High Court to revise the Order of the Court of the Sub-divisional Magistrate of Bundar dated 2—8—1922 in Miscellaneous Cases Nos. 42 and 47 of 1921.

K. Venkataramana Raju for the petitioner.

V. Ramadas for the 1st respondent.

The Court made the following

ORDER :—An objection has been taken that the Magistrate acted illegally in dropping proceedings under S. 145 Criminal Procedure Code on being satisfied that no dispute likely to cause a breach of the peace existed.

It is argued that he was bound to record the evidence of the witnesses of the petitioner, who might have shown by evidence that a dispute still existed, and that he should not have

*Cr R C Nos. 206 and 207 of 1923.
Cr R P Nos. 160 and 161 of 1923. 19th February, 1924.

Surya-narayara v. Sree Raja Ankineed Prasad Bahadur

acted on the petition of the niece of the Zamindar who stated that she had compromised the matter in dispute between herself and the Zamindar who is the 1st Counter-petitioner.

In *Manindra Chandra Nandi* v. *Barada Kanta Chowdhry* (1) it was held that *whatever the source of the* Magistrate's information he might act upon it if he was satisfied that the state of things which alone would have given him jurisdiction to proceed with the enquiry no longer existed and in another case in the same volume at page 161 it was pointed out that S. 145 (5) gives even third parties who are interested in the land a right of intervening and showing that no dispute existed. When the Magistrate is able to act on a police report or other information in starting proceedings under S. 145, I do not see why he should not stay further proceedings on similar information without being obliged to record such evidence as the parties may produce with the same formality as he would have done, if he had gone on with his enquiry instead of dropping it. The petitioner cannot complain that he had no opportunity of showing cause against the order that was made, as the Magistrate's order contains a full discussion of his power to drop proceedings at any stage. I decline to interfere with the order of the Magistrate on this point.

As regards the money deposited in Court, it appears that the deposits made by bidders at the sale of the right to cultivate the disputed lands in fasli 1332 was ordered to be returned to them. That was a proper order, as the sale was cancelled in consequence of these proceedings. The main order speaks of some other money deposited in Court. This may be the sale proceeds of crops that were standing on the lands when the lands were attached. If so, that money might have been ordered to be restored to the persons who raised the crops, as was done in *Mahalakshmi* v. *Subbarayudu* (2). But there is authority in *Chenga Reddi* v *Ramaswamy Goundan* (3) for the orders passed in this case, *viz.*, that the money should be kept in deposit in the Court until one party or the other obtained an order in his favour. I shall therefore allow the order to stand.

The Criminal Revision Petitions are dismissed with costs. Vakils fee Rs. 50.

C. A. S. *Petition dismissed.*

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1. I L R 30 C 112 at 116. 2. (1922) 17 L W 429. 3. 12 Cr L J 104.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD BLANESBURGH, MR. AMEER ALI AND LORD SALVESEN.

Mahomed Rahimtulla Haji Joosab ... *Appellant**

v.

Esmail Allarakhia ... *Respondent.*

On Appeal from the High Court of Judicature at Bombay

Money paid into Court—Right to draw out—Mortgage—Civil Procedure Code, 1908, *S.* 47.

In 1907, the widow of a deceased Hindu, for herself and as guardian of her son, Banemiya, and her daughter, Putlabai, sold his land to one Poonamchand, who in 1911 re-sold it to the appellant. Banemiya and Putlabai subsequently in 1914 instituted a suit to set aside the sale, and the Court decreed in 1918 that, upon their paying into Court within 6 months a certain sum of money they should get possession of their shares in the property in partition, but that, in 1918 that, upon their paying into Court within 6 months a certain sum of money ed to have in 1915 obtained a mortgage from Banemiya, paid the decretal amount into Court, 4 days before expiration of the 6 months, to save the suit from being dismissed. In the meantime, Banemiya had sold the remaining interest in the property to the respondent. On 4th October, 1918, Dattatraya's mortgage having been discharged, he applied to the Court to withdraw the deposit. The respondent opposed the application, and claimed payment of it out to himself. The Subordinate Judge allowed Dattatraya's application. The High Court at Bombay on appeal set aside this order, holding that, though the deposit money was produced by Dattatraya, it was paid in to the credit of the proceedings, and could only be dealt with on an application in the regular course by one of the parties, and that respondent was a person in whose favour the plaintiffs in the suit had created a legal interest entitling them to apply to benefit by the deposit.

Held, by the Privy Council, affirming the Judgment of the High Court that (1) the mortgagee having acquired the rights of the mortgagors in the mortgaged property, had an absolute right for the protection of his security to make the deposit in Court under the decree ; (2) the benefit of such deposit enured to all parties having an interest in the performance of the condition imposed by the decree.

Appeal from a decree of the High Court of Bombay (22nd September, 1920), setting aside an order of the First Class Subordinate Judge of Thana (5th October, 1918), which dismissed an application made in execution proceedings in a suit instituted in his Court.

The plaintiffs in the suit (No. 57 of 1914) were Banemiya, a son, and Putlabai, a daughter (since deceased) of one Balabhai deceased, and the owner of certain land in the village of Kurla which, at the time of his death, had been attached and

*P C No. 81 of 1922. 13th March, 1924.

P. C.
Mahomed Rahimtulla Haji Joosab *v.* Esmail Allarakhia

ordered to be sold in execution of a decree against him. Balabhai had left a widow (Benubai) and children, and the widow, acting for herself and the children, settled the claim under the decree for Rs. 1,250, and in April, 1905 paid it off for that amount, which she raised by mortgage of the said land. On the 25th November, 1907, she sold that land to a Marwari named Poonamchand for Rs. 4,469-10-0 and in 1911, Poonamchand resold it to the Appellant for Rs. 11,922. In the year 1914, the Plaintiffs (Banemiya and Putlabai, the surviving children of Balabhai, who were each entitled to a 5-annas share in his estate by inheritance) brought the suit (No. 57 of 1914) in the Court of the Subordinate Judge at Thana against the Appellant to have the sale by Banubai to Poonamchand set aside, for a declaration that their shares in the estate were not affected by such sale as it was without legal necessity and to recover possession of their shares by partition. That contention was upheld by the Subordinate Judge (R. B. Gogte, Esq.) and by the High Court (Batchelor and Kemp, JJ.) on appeal (Appeal No. 156|1915) on the 26th February 1918 ,and a final decree was then passed that the plaintiffs should recover possession of the land in suit upon payment to the appellant within 6 months of a 10-annas share of Rs. 1,250 and Rs. 1,200, with interest thereon at 12 per cent. per annum, being the amounts by which the deceased's estate seemed to have benefited from the sale during their minority, but, upon default in payment of the said amounts, the suit was to stand dismissed with costs. Neither of the plaintiffs made any payment under this decree, but one Dattatraya Ramchandra Gandhi (hereinafter referred to as "Dattatraya") who claimed to be a mortgagee of Banemiya's said share, made an application (No. 100 of 1918) in the said Suit (No. 57 of 1914) on the 22nd August, 1918, *i. e.*, 4 days before the expiry of the period provided for in the decree, to be allowed to pay Rs. 4,000 into Court. He alleged *inter alia* as follows in his application :—

"After the above suit was decided, and before the filing of the appeal in the High Court, the said plaintiff (Banemiya) borrowed on the 21st of July, 1915 from the present applicant Rupees Two Thousand in cash for expenses and for paying off sundry debts, and, in security for the same, he has mortgaged his share in the property in suit to the present applicant, and has passed a registered mortgage-deed, whatever expenses the mortgagee will be required to make for the protection of the mortgaged property, will be a charge on the mortgaged property.

P. C.

Mahomed Rahimtulla Haji Joosab v. Esmail Allarakhia

"4. The amount which is to be paid before the 26th August, 1919 by the said plaintiff for being paid to the same Mahomed Rahimtulla according to the High Court decree, is less than Rs 4,000 according to the applicant's calculation, and the said amount has not yet been paid by the said plaintiff, Banemiya. And the present applicant apprehends that the said plaintiff and defendant Mahomed Rahimtulla acting in collusion have determined not to pay the amount, and thereby they intend to defraud the present applicant.

"5. The present applicant gave notices to the said two persons some days ago and informed them that Banemiya should pay the amount, and, in case he did not pay the amount, the present applicant would pay it. But he has not paid the amount nor was any reply of the notice given (to me). Therefore, the applicant is obliged to pay into Court the amount for the purpose of protecting his share.

"6. The amount to be paid according to the applicant is less than Rs. 4,000 as stated in cl. 4 above, but the applicant is this day paying Rs. 4,000. Therefore, if the amount to be paid be found to be less, then that much amount may be ordered to be paid to the said Mahomed Rahimtulla. If the amount be found to be more than Rs. 4,000, then the applicant is prepared to pay the additional amount that may be found (payable).

"The applicant prays as follows :—The said amount may be ordered to be received for payment to Mahomed Rahimtulla according to the High Court decree and paid to him."

This application was granted and the sum of Rs. 4,000 was accepted by the Nazir of the Court.

On the 4th October, 1918, Dattatraya made a further application for the return of his deposit, alleging as follows :—

"2. The applicant is the mortgagee of the property in suit, and he has taken a registered mortgage deed dated 21—7—15.

"3. The amount of the said mortgage deed was paid to me on the 3—10—18.

"4. In order that the property taken in mortgage by me might not be endangered, I voluntarily made application No. 100 of 1918 to this Court on date 22—7—18, and deposited a sum of Rs. 4,000, and have got receipt for the same over the signature of the Nazir of this Court.

"5. The applicant prays as follows :—The amount of my mortgage deed dated 21—7—15 having been paid, there is now no possibility of my being involved in loss. Therefore the sum of Rs. 4,000 (four thousand) deposited by me in Court on date the 22—8—18 may be ordered to be returned to me."

The respondent made a counter-application, under S. 47 of the Civil Procedure Code, 1908, praying that Dattatraya should not be allowed to withdraw his deposit, and that he (the respondent) should have liberty to come in and take the benefit thereof. In his application, the respondent alleged *inter alia* as follows :—

"While the appeal was pending in the High Court, Banemiya sold to Narayan Ramchandra Gandhi his (Re) 0—5—0 five annas share in the plaint property for himself and as guardian of the minor Putlabai on the date the

15th of September in the year 1916. Putlabai died on or about the 21st of July in the year 1917. Her heirs are her husband Khaja Mahomed, mother Banubai and sister Rajbai and brother Bani Miya.

"On the date the 10th of June in the year 1918, Banemiya made a Sata (agreement) to sell for a sum of Rs. 2,500 his own right and interest and that of Putlabai in the plaint-property to the present opponent, Esmail Alla Rakhia, and received Rs 275 including earnest money, etc. In the said Satapatra (bargain paper or agreement) it was agreed as follows :—The opponent should pay the amount to be paid under the High Court decrees and the amount to be paid to the mortgagee and the opponent should recover the costs awarded to Banemiya in both the Courts and should take possession of the property and Banemiya should get the said transaction completed within one month. Banemiya had taken upon himself the responsibility to bring the consent of the heirs of Putlabai. Accordingly the consent of Banubai and Rajabai was obtained. But Banemiya did not bring the consent of Khaja Mahomed up to this time.

"Further, the opponent came to know as follows :—Banemiya colluded with Mahomed Rahimtulla and he began to avoid executing sale deed according to the agreement made. Therefore the opponent Esmail Alla Rakhia filed the Original Suit No. 1233 of 1918 against Banemiya in the Hon'ble the High Court at Bombay. And the same is at present pending.

The Subordinate Judge dismissed this application, holding that, though the respondent was entitled to apply under S. 47 of the Code, Dattatraya had nothing to do with respondent, and that having paid in the money to secure his own interest, he was entitled to withdraw it.

The respondent appealed to the High Court on the 29th January, 1919, (First Appeal No. 9 of 1919) and in his affidavit in support thereof, he alleged as follows :—

"On the 21st July, 1915, respondent No. 1, Dattatraya Ramchandra Gandhi in consideration of Rs. 2 000 took in mortgage from Banemiya Balabhai respondent No. 3, his six annas and eight pies share in the properties in suit ; that on the 15th day of September, 1916 the said Banemiya Balabhai for himself and as the natural guardian of his sister Putlabai sold to Narayan Ramachandra Gandhi five-annas share in the property in dispute being one-half of their aggregate share of ten annas, that on the 3rd day of July 1918 the said Narayan Ramchandra Gandhi transferred to Motilal Ratansi his five annas share, that the High Court in First Appeal No. 156 of 1915 on 26th February, 1918 passed a decree that on the plaintiffs Banemiya Balabhai and Putlabai paying the sums due from them within six months, they are to recover their ten annas share ; that on 22nd August, 1918 Dattatraya Ramchandra Gandhi paid in the Thana Court Rs. 4,000 in satisfaction of the above decree of the High Court ; that on 3rd August, 1918, the said Dattatraya Ramchandra Gandhi and Motilal Marsey (? Ratansi) agreed with me Esmail Alla Rakhia in consideration of Rs 4,000 to be paid to them and on my paying Dattatraya Ramchandra Gandhi Rs. 4,000 to be paid by him in the Thana Court to transfer the rights acquired by them in the properties in dispute as mentioned above, and to allow me to continue the proceedings in execution in the Thana Court

P. C.
Mahomed Rahimtulla Haji Joosab v. E-mail Allarakhia

but having colluded as I think with the respondent No. 2 Mahomed Rahimtulla they refused to carry out the agreement."

The appellate Court (Sir Norman Macleod, C. J. and Fawcett, J.), in a considered Judgment on the 22nd September, 1920 (reported in I. L. R. 45 Bom. 967), disagreed with the Subordinate Judge on the law, holding that, though the Rs. 4,000 had been paid into Court by Dattatraya, it had been paid into the credit of the plaintiffs, and should not have been allowed to be withdrawn by any other party; they accordingly set aside the order of the Subordinate Judge. They further decreed that the respondent should be given time to deposit the Rs. 4,000 in Court, such deposit to be treated as made within the period of six months originally allowed by the High Court. Against this latter decree, the appellant appealed to the Privy Council.

14th and 15th February, 1924. *Sir George Lowndes, K. C.* and *Raikes* for appellant: The respondents' application for withdrawal of Dattatraya's deposit did not fall within the terms of S. 47 of the Civil Procedure Code, 1908. Even if it did, the Subordinate Judge was right in holding that Dattatraya, having nothing to do with the respondent, the person who paid it in (*viz.* Dattatraya), the only person who could withdraw it; in fact, he had an absolute right so to withdraw it. The High Court erred in passing a decree in favour of respondent when he had given no evidence in support of his case, and his evidence in his affidavit of 21st January, 1919 had not been tested by cross-examination; this affidavit should not have been perused or considered by the High Court, as the appellant had had no opportunity of meeting it. Further, the respondent's application showed that he had no interest in the property in question, or at any rate, in Putlabai's share therein, and Banubai's interest in Putlabai's share was liable in her, and her assignee's hands to make good her sale of the property to the appellant. By the terms of the decree of the 26th February, 1918, as the plaintiffs did not pay into Court the money therein specified in due time, the suit automatically stood dismissed on the 26th May, 1918. There was, moreover, no evidence that appellant colluded with Banemiya or Dattatraya or anyone else to dispute the respondent's claim, or that he had notice thereof. And the appellant was entitled to take any steps to protect his own interests, and buying out any other claimants on the property was one of such steps.

P. C.

Mahomed Rahimtulla Haji Joosab v. Esmail Allarakhia

Dunne, K. C. and *Mc Nair* for respondent : The condition of the High Court of the 26th February, 1918 was satisfied by payment of the decretal amount by Dattatraya, and the decree thereupon became absolute. The effect of such payment into Court was to entitle the plaintiffs or their representatives to obtain possession of the property. The payment by Dattatraya was money paid in to the credit of the plaintiffs and could not be withdrawn except on an application by one of the parties. Neither plaintiff would be entitled to withdraw the money in Court and thereby extinguish the interest in the property which he or she had contracted to sell to the respondent. The application for withdrawal was not *bona fide,* but made collusively to defeat the respondent's rights under his agreement of the 10th June, 1918.

13th March, 1924. The Judgment of the Board was delivered by

Lord Salvesen.

Lord Salvesen :—This is an appeal from a decree of the High Court of Bombay of the 22nd September, 1920, which set aside an order of the Subordinate Judge of Thana, dated the 5th October, 1918.

The appellant derives such title as he has to the property in dispute from the widow of Balabhai, a Mohammedan resident in Bombay. When she sold the property, the widow professed to act for herself and as guardian of her minor children. The transaction was, however, challenged by Banemiya, the only son of Balabhai then surviving, and by others representing the rest of the family, by a suit raised in 1914 in the Thana Court, in which they claimed that the sale by the widow should be set aside in so far as the shares of the son and daughters were concerned. In that suit, which ultimately came to depend before the High Court of Bombay, Banemiya and his co-plaintiffs on the 26th February, 1918, obtained a decree against the appellant which is thus expressed :—

"The plaintiffs will have six months within which to pay their share, i. e., 10|16th of the Rs. 1,250 and the Rs. 1,200, with added interest as directed in the lower Court's judgment."

"If within six months the plaintiffs pay the sums due from them they are to recover possession of the land in suit. But if within that time the plaintiffs do not pay the sums due from them then the suit to stand dismissed with costs."

Prior to the date of this decree, Banemiya had, on the 21st July, 1915, mortgaged his share of the property to one, Dattatraya R. Gandhi, for Rs. 2,000. On the 15th September,

1916, he had sold a 5 annas share to Narayan, a brother of Gandhi, who in turn transferred it to one Motilal Ratansi. Subsequent to the decree, Banemiya contracted, on the 10th June, 1918, to sell to the respondent all his remaining interest in the property and undertook to obtain an assignment in his favour of the right, title and interest of the heirs of his sister who had died. By these transactions Banemiya, for himself and the other plaintiffs (assuming he was authorised to act for them), deprived himself of all interest in the conditional decree of the 26th February, 1918. In these circumstances, the mortgagee, Dattatraya R. Gandhi, realising that the security which he held over the property would become valueless if the condition specified in the decree was not purified, on the 22nd August, 1918, or four days before the money fell to be paid, presented an application in which, on the narrative that Banemiya had failed to pay the sum required and that he estimated the sum at less than Rs. 4,000, prayed that the said amount might be ordered to be received for payment to the appellant according to the High Court decree and paid to him. The money was duly deposited in Court and a notice to this effect was signed by Mr. R. B. Gogte, Sub-Judge.

No question has been raised as to the sufficiency of the amount to satisfy the appellant's claim, nor is it open to doubt that the appellant would have been entitled to uplift the whole sum of Rs. 4,000 or as much of it as represented the Rs. 1,250 and Rs. 1,200 with added interest which formed a first charge on the shares of Banemiya and his sister.

The appellant, however made no application for payment to him of the sum deposited. Instead of doing so he entered into an agreement dated the 3rd October, 1918, with the two brothers Gandhi, the substance of which was that in consideration of Rs. 5,000 paid by the appellant to them, they agreed to withdraw the application under which the Rs. 4,000 had been deposited and to claim the return of the said sum to the depositor. In terms of this agreement, an application in the name of Gandhi was duly lodged on the 4th October, 1918, in the Court of the First Class Sub-Judge at Thana. The applicant prayed for the return of the deposit made by him on the ostensible ground that, as the amount of his mortgage had been repaid, there was now no possibility of his being involved in loss. The application was opposed by the respondent. He maintained that the payment made by Gandhi had fulfilled the condition in the decree, and offered to pay the amount of

P. C.

Mahomed Rahimtulla Haji Joosab v. Esmail Allarakhia

Lord Salvesen.

Rs. 4,000 to the appellant on the footing that such payment should be treated as equivalent to the payment made by Gandhi. The Sub-Judge overruled the respondent's contentions and allowed Gandhi to take back the money, and it was, in fact, uplifted by him. The respondent thereupon appealed to the High Court, which set aside the order granting leave to Gandhi to take back his money and allowed respondent an opportunity of paying the money within a specified short period, such payment to be treated as within the period of six months allowed by the decree of the 26th February, 1918.

Various contentions were put forward by the appellant in support of his appeal from this order (1) He contended that on a sound construction of the decree the sum that was provided to be paid by the plaintiffs in that suit fell to be paid to the appellant and that a deposit in Court did not satisfy the condition in the decree. Their Lordships are clearly of opinion that while the condition would have been satisfied by a payment to the appellant in person, which he accepted it was equally satisfied by a payment into Court, and that the latter was, in the circumstances, the appropriate mode of satisfying the condition. (2) It was contended that a deposit made by another than a party to the suit did not satisfy the condition, and that the mortgagee, who was not a party, had no right in a question with the appellant to make the deposit. Their Lordships agree with the learned Judges of the High Court in rejecting this argument for the reasons they state. They are further of opinion that the mortgagee had an absolute protection of his own property to make the deposit and so prevent his security from becoming valueless. To the extent of the value of his mortgage granted by the plaintiffs in his favour he had acquired their rights, and the mortgage deed expressly authorises him to charge on the mortgaged property any expenses which the mortgagee might be required to make for his protection.

(3) Lastly, it was contended that the mortgagee had an absolute right to withdraw the deposit. If no other interests were in question but those of the mortgagee and the appellant this would no doubt have been the case. But it cannot be overlooked that the real object of the application for the withdrawal was to defeat the claims of the respondent who was the only other person that had an interest in the condition expressed in the decree being satisfied. Their Lordships think that

P. C.

Mahomed Rahimtulla Haji Joosab v Esmail Allarakhia

Lord Salvesen.

the benefit of the deposit having been made before the expiry of the time limit necessarily inured to all parties having an interest in the condition being purified. The legitimate interest of the appellant was to obtain payment of the sums to which he was preferably entitled and this was secured to him by the deposit. Just as the plaintiffs' suit would have stood dismissed if the deposit had not been made, so equally the decree provided that if the sums in question were paid the plaintiffs were to recover possession of the land in suit. The respondent in virtue of the agreement of the 10th June, 1918, of which he subsequently obtained a decree of specific implement, is now in right of this decree and entitled to enforce it against the appellant. As, however, the money deposited by Dattatraya had been actually uplifted by him before the order of the High Court was made, the condition which the Court imposed on the respondent appeared to be the only method by which the position which had been inverted by the appellant's action could be restored so as to do justice between the parties. Their Lordships are accordingly of opinion that the decision of the the High Court was right and they will humbly advise His Majesty that the appeal should be dismissed with costs.

Solicitor for appellant : *T. L. Wilson and Co.*

Solicitor for respondent : *Ashurst, Morris, Crisp and Co.*

A. D. M. ——— *Appeal dismissed.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Narayanan Chetty, declared major *vide* orders dated 16—2—1921 and 23—2—1921 on C. M. P. Nos. 189 and 413 of 1921 and others *Appellants** (*Defendants in O. S. No.* 84 *of* 1915 *and plaintiffs* 2 *to* 4 *in O. S. No.* 90 *of* 1914)

v.

Muthiah Chetty (dead) and others *Respondents* (*Plaintiffs* 1—4 *and* 1*st defendant*).

Narayanan Chetty v. Muthiah Chetty.

Specific performance—Contract by manager of a joint Hindu family to sell property—Specific performance of contract against minor members after death of manager.

*Appeals Nos. 25 and 26 of 1917. 6th March, 1924.

Narayanan Chetty v. Muthiah Chetty.

A contract by a manager of a joint Hindu family to sell immoveable properties which is entered into by him on behalf of the family and for purposes binding on the family, can be specifically enforced against the surviving members of the family after his death, even though some of them may be minors.

Krishna Aiyar v. *Shamanna*, (1912) 23 M L J 610 ; *Bappu* v. *Annamalai Chettiar*, (1922) 44 M L J 226 at p. 228 ; approved.

Mir Sarwarjan v. *Fakhruddin Mahomed Chowdhury*, (1911) I L R 39 Cal 232: 21 M L J 1156 (P C) distinguished.

Appeals against the decrees of the Court of the Temporary Subordinate Judge of Sivaganga in O. S. Nos. 84 of 1915 and 90 of 1914, dated 14th September, 1916.

A. Krishnaswami Aiyar, T. V Muthukrishna Aiyar and *N. Muthuswami Aiyar* for appellants.

S. Srinivasa Aiyangar, K. Rajah Aiyar and *R. Srinivasa Aiyangar* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—Appeal No. 25 of 1917 This appeal arises out of a suit for specific performance of an agreement to sell. The Subordinate Judge decreed the suit. The defendants appeal.

Narayana Chetti, father of 4th defendant and his younger brother, Muthiah Chetti, father of defendants 1 to 3 were carrying on business at Rangoon under the style of M. P. M. Rm. In the course of the business, one Veerappa Chettiar of the Pl. R. M. Firm, became indebted to the firm to the extent of Rs. 3,000, but was unable to pay the debt. The 2nd plaintiff advised the agent (Alagappa) of the defendants through P. W. 6 of the connected suit O. S. No. 90 of 1916 (examined on commission at Rangoon), to buy the suit site and that he (the 2nd plaintiff) would " take it off him afterwards, " so that defendants' firm who are not in need of the site need not lose interest. (*Vide*, Ex. G-2). The defendant's father purchased the site for Rs. 5,000, the consideration consisting partly of cash and partly of the debt due by Veerappa (Ex. A). Before it could be re-conveyed to plaintiffs, it was found that, out of Veerappa's two brothers, while one attested the sale deed, the other Murugappa Chetti was disputing the validity of the sale. The plaintiffs and defendant's father discussed the best method of satisfying him and ultimately (*vide*, Ex. G-1), the plaintiffs paid Rs. 1,000 to buy him off, and obtained a release deed, Ex. D, at Rangoon. Meanwhile, before the payment and execution of Ex. D were known to the parties, the defendant's father executed Ex. C

Narayanan Chetty v. Muthiah Chetty — Ramesam, J.

in favour of plaintiffs. The document has been proved to be genuine. All the evidence oral and documentary supports it. The plaintiffs agreed to pay Rs. 4,500 besides the Rs. 1,000 paid to Murugappa for executing Ex. D. They issued a Hundi (Ex. B) and it was cashed, (Exs. F and K). The incorrect date in Ex. F (an account book of the defendants) cannot affect the plaintiff's case.

Thus, the plaintiffs have proved the suit agreement, the payment of consideration and that the transaction was beneficial to the defendants' firm who were anxious to part with the site to the plaintiffs who, by offering to purchase, diminished the defendants' loss. Assuming that the proper price of the site at the time was Rs. 5,000, the defendants, if they wanted to keep the site, would have had to pay Rs. 1,000 to Murugappa. The plaintiffs by intervening and paying Rs. 5,500 (*i. e.*, Rs. 1,000 to Murugappa and Rs. 4,500 to the defendants' firm) reduced the defendant's loss from Rs. 1,000 to Rs. 500. In this sense, it was beneficial to the family of the defendants who were a trading firm in need of money rather than the suit property which was not situate in the defendant's village.

The point strongly pressed by the Vakil for the appellants is that, the defendants 2 and 3 being minors, there can be no decree for specific performance against them. There is no general rule that no decree for specific performance can be passed against minors. For instance, in the simplest and obvious case where a contract is entered into by a Hindu in respect of property which is not joint family property and the property devolved by inheritance on heirs, some or all of whom are minors, it cannot be contended that no decree for specific performance can be made and this is conceded by the appellant. The next case is where a Hindu, who is a member of a joint family, enters into contract *to sell his own share* and dies and the property descends by survivorship to other members of the family some or all of whom may be minors. In *Bhagwan* v. *Krishnaji* (1) it was held that it can be enforced against the undivided *sons* of the deceased. I think this decision is not in conflict with the opinions of Wallis, C. J. and Sadasiva Aiyar, J. in *Rangayya Reddi* v *Subramania Aiyar* (2): nor with the actual decision in *Bappu* v *Annamalai Chettiar* (3),

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(1920) 22 Bom L R 997. 2. (1917) I L R 40 M 365 : 32 M L J 575.
3. (1922) 44 M L J 226.

Narayanan Chetty v. Muthiah Chetty — Ramesam, J.

which is not a case of a member contracting *to sell his own share*. If the point arises for decision, I would perhaps hold that the case in *Bhagwan* v. *Krishnaji* (1) is correctly decided on grounds which need not be stated. The case when the contract is made on behalf of a minor or minors, is settled by the decision in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (4). Mr. Srinivasa Aiyangar contends that, all that the Judicial Committee decided was that such a contract cannot be specifically enforced only when it was not for porposes of necessity, binding on the minors and the contract in that case which was one for the purpose of immoveable property was not for the benefit of the minors. I cannot agree with this narrow interpretation of the decision. Their Lordships say at p. 237 " They are, however, of opinion that it is nor within the competence of a guardian of a minor to bind the minor or the minor's estate by a contract for the purchase of immoveable property." There is no reference here to ' necessity ' nor is any distinction drawn between a contract being merely ' advantageous ' to a minor as opposed to its being for necessary purposes binding on the minor though, earlier in the Judgment, their Lordships accept the assumption that the purchase was an advantageous " purchase for the minor." I think this decision also covers this case where a joint family consists of minors only and therefore has no manager and a guardian of all the minors who is, *ex hypothesi* not manager, not being member of the family but is merely their guardian enters into a contract on behalf of some or all of the minors, whatever the nature of the contract may be.

The present is a case where the contract is entered into by the manager of a family on behalf of the whole family for purposes binding on the family. The decision in *Bappu* v *Annamalai Chettiar* (3) does not help the appellant for the contract in that case was not for purposes binding on the family and the remarks at page 228 are against him. The remarks in *Krishna Aiyar* v. *Shamanna* (5) are against the appellant and in favour of the respondent. The observations in both these cases are *obiter*, not being necessary for the decisions. In *Narayana Rao* v. *Venkatasubba Rao* (6) Spencer, J., conceded that a contract made by a manager on behalf of the family may be enforced against the manager and where it

1. (1920) 22 Bom L R 997.
3. (1922) 44 M L J 226.
4. (1911) I L R 39 C 232 : 21 M L J 1156 (P C).
5. (1912) 23 M L J 610.
6. (1919) 38 M L J 77 at p. 79.

Narayanan chetty v. Muthiah chetty — Ramesam, J.

is for the benefit of the family, the completed contract will certainly bind the minor members. Should the accident of the death of the manager before completion in such a case make any difference ? Where a contract is by a manager on behalf of a family, and for the benefit of the family and the manager dies, it can be enforced against the survivors when they are all majors, *Venkateswara Aiyar* v. *Raman Nambudripad* (7). Should it make any difference that some of the survivors are minors, and does the case in *Mir Sarwarjan* v. *Fakhruddin Mahomed Chowdhury* (4) support such a distinction ? The matter is *res integra* and, I am inclined to answer the above queries in the negative. I agree with Phillips, J.'s remarks in *Bappu* v. *Annamalai Chettiar* (3) where he refers with approval to *Ramachandra Aiyar* v. *Sundaramurthi Mudali* (8) and the *obiter dicta* in *Krishna Aiyar* v. *Shamanna* (5). The result is, we are of opinion that a decree for specific performance may be passed against the minor defendants 2 and 3. The pleadings and the allegations in I. A. No. 728 of 1914 (in O. S. No. 90 of 1914) show that 4th defendant is not divided from defendants 1 to 3 and no separate argument can be adduced for him.

The suit is not barred by limitation as it does not appear that the specific performance of the contract was refused more than three years prior to suit [*Venkanna* v. *Venkatakrishnayya* (9).]. The words 'on demand' in Ex. C show, in a case like this, the cause of action arises only after request (See 19 Halsbury, S. 65, p. 43).

The result is, the appeal fails and is dismissed with costs. It is conceded that A. S. No. 26 of 1917 follows. It is also dismissed with costs.

Jackson, J. :—I agree.

C. A. S. *Appeal dismissed.*

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7. (1916) 3 L W 435.
8. (1893) 4 M L J 9.
4. (1911) I L R 39 C 232 : 21 M L J 1156 (P C).
3. (1922) 44 M L J at p. 228 (2 para)
5. (1912) 23 M L J 610.
9. (1917) I L R 41 M 18.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—SIR WALTER SALIS SCHWABE K. C. *Chief Justice*, AND MR. JUSTICE RAMESAM.

The Official Assignee of Madras and others ... *Petitioners* (1st Petitioner is the Respondent in O. S. No. 39 of 1918 on the file of the High Court and the 2nd petitioner is one of the creditors and others are added as party petitioners).*

v.

The Official Assignee of Rangoon and another ... *Respondents 1st Respondent is the appellant and 2nd Respondent is the 2nd Insolvent in O. S. No. 39 of 1918).*

The Official Assignee of Madras *v.* The Official Assignee of Rangoon

The Presidency Towns Insolvency Act Ss. 8 and 22—Insolvency Appeal—Order of adjudication annulled—Pendency of proceedings in another Court—Power of Court to review order—" The same debtor "—Meaning of—Two persons adjudicated in one Court and one of them in another—If Court can annul order under S. 22.

Where in an appeal against an order of a Judge of the High Court exercising insolvency jurisdiction, the appellate Court acting under S. 22, Presidency Towns Insolvency Act annulled an order of adjudication on the ground that insolvency proceedings were pending in another British Court, it has also power under S. 8 to review, rescind or vary the same, as the order was made in the exercise of its insolvency jurisdiction. *In re Maugham, Ex parte Maugham* (1888) 21 Q. B. D. 21, 23. *Ex parte Perkins* (1890) 7 Morr. 78, followed.

Two persons constituting a firm were adjudicated insolvents by the Madras High Court and thereafter insolvency proceedings were instituted in Burma against the same firm but they resulted in the adjudication of only one of them as insolvent. *Held,* S. 22 cannot apply and the former order of adjudication cannot be annulled as the debtor or debtors in the two Courts are not the same.

Evidence Act, S. 41—Insolvency Court Refusing to adjudicate person bankrupt—Partnership—Membership disputed—Legal character—If a judgment in rem—Powers of review—Presidency Towns Insolvency Act, S. 8—Limitation Act, if applies—Time for review—If can be extended—Madras High Court Appellate Side Rules, Appx. II, R. 41—Applicability—Insolvency appeals.

An order of an Insolvency Court refusing to adjudicate a person insolvent on the ground he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any legal character within the meaning of S. 41 of the Evidence Act and hence it is not a judgment in *rem.* Being a partner in a firm is not a legal character as contemplated by the section.

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*C M P No. 3032 of 1922. 21st November, 1923.

The Official Assignee of Madras v The Official Assignee of Rangoon

An application under S. 8 of the Presidency Towns Insolvency Act to review an order made by the High Court in its insolvency jurisdiction can be entertained even when it is presented out of time, as the Court can under S. 5 of the Limitation Act extend the period, if it is satisfied by the applicant that he had sufficient cause for not making the application within the prescribed period.

R. 41 of Appx. II of the Madras High Court Appellate Side Rules applies to insolvency appeals and in a case of special difficulty and importance, the Court hearing the appeal can allow a higher fee than would ordinarily be admissible.

Quaere if the Limitation Act applies to all applications under S. 8 of the Presidency Towns Insolvency Act ?

Petition praying that in the circumstances stated in the affidavit filed therewith, the High Court will be pleased to rescind the order of the High Court dated 27—8—1918 and made in its appellate jurisdiction in O. S. Appeal No. 39 of 1918 annulling the order of adjudication dated 23—4—1917 and made in the exercise of its Original Insolvency Jurisdiction in I. P. No. 83 of 1917 and to revise the Insolvency proceedings in the High Court.

G. Krishnaswami Iyer and *R. Swaminatha Iyer* for petitioners.

T. R. Venkatarama Sastry and *L. S. Veeraraghava Aiyar* for the Official Assignee, Rangoon.

A. Krishnaswami Aiyar, M. Subbaraya Aiyar and *N. Chandrasekhara Aiyar* for the insolvent respondent.

The Court delivered the following

Sir Walter Schwabe, C J.

JUDGMENTS :—*The Chief Justice* :—A preliminary point is taken in this motion, that this Court has no jurisdiction to hear it. The motion is to set aside, an order made by the Court of Appeal, on appeal from an order of Bakewell, J. sitting in Insolvency, under S. 22 of the Presidency Towns Insolvency Act. The Court ordered that the adjudication of the insolvent by the Insolvency Court should be annulled on the ground that there had been a later adjudication in Burma and that it would be better and more convenient that the estate should be administered by that Court.

By S. 8, the Court may review, rescind or vary any order made by it, in its insolvency jurisdiction and by S. 2, " Court " means " the Court exercising jurisdiction under this Act. " It is said that the original Insolvency Court which is the Court presided over by the Judge, appointed under S. 6, by the Chief Justice to exercise jurisdiction in insolvency, can review, rescind

The Official Assignee of Madras *v.* The Official Assignee of Rangoon

Sir Walter Schwabe, C. J.

or vary an order but that where an appeal has been taken from that Judge and an order made by the Court of Appeal, there is no power to rescind, review or vary that order, either in the Court of Appeal or in the Judge sitting in insolvency. This would be a somewhat startling result, because the Court of Appeal may and does make orders clearly in the exercise of insolvency jurisdiction, such as an order adjudicating an insolvent, or as in this case, annulling an adjudication. I would want very clear words to make me construe the section as giving an inferior Court power to review, rescind or vary its orders, while refusing that same power to a superior Court. I can find no such words in the section. It is true that a Court of Appeal has no power as such to review, rescind or vary its orders, except under the particular circumstances provided by the Statute or Rules having statutory force, such as in the case of slips ; but in insolvency, the legislature has chosen both here and in England to give this power of review, rescission or variation in insolvency, which is not given to other Courts and in my judgment, it follows that this Court has the power to review, rescind or vary an order made by it, in the exercise of its insolvency jurisdiction, and, in my view, the order in this case was an order made in the exercise of its insolvency jurisdiction.

There is a direct authority on this point in England, *In re Maugham, Ex parte Maugham* (1), where A. L. Smith, J. said

" If the registrar makes the order, he is the Court that makes it, and he alone is the Court which can review or rescind it and the same power is given to the Judge, the Divisional Court, and the Court of Appeal. But no one of these Courts can review, rescind or vary the order of any other, unless a right of appeal is clearly given by the statute. "

That point came directly before the Court of Appeal in *In re Perkins* (2), where the Court of Appeal rescinded its own order, reversing the decision of the Registrar, and it held it had jurisdiction to adjudicate a man as bankrupt. The English section and the Indian section are in effect identical and I see no reason to take a different view of its proper construction. The preliminary point fails.

A further preliminary point was taken that this power did not apply to matters, which came under S. 22 ; but in my

1. (1888) 21 Q B D 21 (23). 2. (1890) 7 Morr 78.

judgment, the exercise of power under S. 22, is the exercise of power under the insolvency jurisdiction, and there is nothing in this point.

A further preliminary point is taken that the application to review or rescind is out of time. We have not at this moment sufficient materials to consider this point and we reserve it till later in the case.

This petition comes on before us in rather curious circumstances. An order was made in 1917, adjudicating two partners of the firm of T. A. R. A. R. M. namely, Ramanathan Chetty, since deceased, and his only son Annamalai Chetty. Insolvency proceedings were also taken in Burma against the firm. For some reason, for which we have no explanation, the proceedings in Madras which were *ex parte,* were not published and at any rate for some time, no further steps were taken, beyond the adjudication. The proceedings in Rangoon were however pressed and a considerable amount of work was done, under the order in that Court. At a later date, application was taken in the Insolvency Court here to stay the proceedings here, pending the completion of the proceedings in Rangoon, or to take some other course which would have the same result. In the end, the matter came before this Court on appeal from Bakewell, J., and this Court ordered that the adjudication in Madras should be annulled on certain terms, and the reason given was that the whole matter would be better disposed of in the Rangoon proceedings. Things have gone on, after that order in Rangoon and there seems to have been considerable amount of litigation ; but, fairly soon, Annamalai Chetty took proceedings to have it declared that he was not a partner in the firm and therefore was not included in the order adjudicating the firm. The Official Assignee of Rangoon did not oppose that application, perhaps being satisfied that it made no difference to him as he got all that he was likely to get ; but however that may be, ultimately, Annamalai Chetty was held definitely not to be an insolvent in Rangoon.

Now this petition is brought before this Court, under S. 8 of the Presidency Towns Insolvency Act, asking us to rescind or review the order of this Court annulling the insolvency here. One of the grounds, on which it is put is this The Court here thought, when it passed that order, that the insolvency in Rangoon was the same as the insolvency here. That in fact was not, because here there were two insolvents

The Official Assignee of Madras v. The Official Assignee of Rangoon
—
Sir Walter Schwabe. C. J.

and there but one, because the Burma Court has found since that its order of adjudication applied only to Ramanathan Chetty and not to Annamalai Chetty ; and if this had been known to this Court, at the time it made this order, it was bound to refuse that because under S. 33 of the Presidency Towns Insolvency Act, under which the Court purported to act, this Court had no power to act, unless the debtors were the same. The words of the section are

"When it is proved to the satisfaction of the Court that the insolvency proceedings are pending in any other British Court against the same person, the Court may annul the adjudication, or may stay all proceeding therein."

I think, they must be read to mean that the debtor or the debtors must be the same ; for, I think it would be an absurd construction to hold, where there was an adjudication against *A* and *B* in one Court and against *A* only in another, it could under that section annul the insolvency of *A* and *B*. It follows therefore, we should be prepared to act under S. 8, if we were otherwise satisfied that it is right that we should. I am not considering now the question, whether in so doing we would impose any and what conditions. It may be a matter for further consideration hereafter. But Annamalai Chetty, who has appeared before us, being a person as much interested in this as anybody, but at the present moment he is not and never been an insolvent, says that the view that was taken in Burma was the right view and that he in fact was never a partner in the firm and if this Court had not annulled the order against him, he would have applied to this Court to have that order annulled and got it annulled. If he is right about that then, the position in respect of what this Court had done entirely changes ; because it had then in effect acted in an insolvency in which Ramanathan Chetty was the debtor, and he being the only debtor in Rangoon, there would be no legitimate complaint on this ground, in respect of the action taken by this Court, because this Court it is true has annulled the adjudication against Annamalai Chetty which, under the circumstances, we hold it had no power to do ; but, if that adjudication was itself wrong and one that ought never to have been made, it can do no one any harm, it having been annulled by this Court's order. We therefore think it right that this question of fact should be investigated, so that we can decide, whether or not this order under S. 8 should be made ; and we propose, by

consent of all parties before us, to refer this matter to one member of this Bench for enquiry and report by him to the Bench and pending that enquiry, this appeal must be adjourned. The question for enquiry will be whether or not Annamalai Chetty was a partner in the firm of T. A. R. A. R. M. in 1917 or otherwise liable to be adjudicated as a member of that firm. All costs will be reserved.

The Official Assignee of Madras v. The Official Assignee of Rangoon

A list of documents alleged to be in the custody of the Official Assignee of Rangoon will be furnished by the petitioners' vakil to the vakil for the Official Assignee of Rangoon; and this Court, so far as it can, directs that such of those documents as are relevant to the proposed enquiry shall be produced, on the enquiry. The parties will be at liberty to call oral evidence.

The case will be posted for hearing before one of us, on the 16th April. Any further application in regard to inspection of documents or anything of that kind must be made to my brother.

The case coming on for hearing after evidence, the Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENTS :—*The Chief Justice* :—This petition was adjoruned so that Annamalai Chetty might have an opportunity of appearing, reserving the question of limitation for further argument, and also the question whether any and what terms should be imposed upon the petitioner in the order which we propose to make. A long and protracted hearing took place on the application of Annamalai Chetty, and the evidence before my brother Ramesam, J., was directed to the question whether or not Annamalai Chetty was, in fact, a partner of the firm and whether the firm had carried on business in Madras within one year prior to the order of adjudication. He heard this evidence and made, as it was arranged, a report to this Court. He came to the conclusion on the evidence that Annamalai Chetty was a partner and that the business had been carried on within one year. On the evidence and on his report I am quite satisfied that the conclusion he came to was the right conclusion. There is nothing more to be said in that matter.

It was then argued on behalf of Annamalai Chetty that he ought never to have been adjudicated as insolvent at all, because there was no proof of any act of insolvency. I think there is nothing in this point at all. There was ample proof before the Court of more than one act of insolvency.

The Official Assignee of Madras v. The Official Assignee of Rangoon

Sir Walter Schwabe. C. J.

The point of limitation was then dealt with both on behalf of Annamalai Chetty and on behalf of the Official Assignee of Rangoon. The point is whether this application, which is an application under S. 8 of the Presidency Towns Insolvency Act, is barred by the lapse of time since the passing of the order now under review. Under S. 8, there is power in this Court in insolvency to review, rescind, or vary any order made by it under its insolvency jurisdiction. If the Limitation Act applies at all to the exercise of powers under that section about which I express no opinion, the Article applicable would be Art. 162, for a review of judgment by the High Court, the period of limitation for which is 20 days from the date of the order ; or Art. 173, for a review of judgment except in the cases provided for by Art. 161 and Art. 162 the period of limitation for which is 90 days from the date of the order. But there is a further statutory provision under S. 5 of the Limitation Act, that, if the Court is satisfied by the applicant that he had sufficient cause for not making the application within the prescribed period, it can extend the time. I am quite satisfied on the evidence before us that the Official Assignee of Madras had sufficient cause for not preferring the application earlier, the cause being that he first heard of the order of the Rangoon Court, and it was through no fault of his, that he did not hear earlier, just before this application was made.

There remains the question whether any condition should be imposed upon the petitioner in setting aside this order. It is suggested that we ought to stay all proceedings in the insolvency here until the Rangoon Court has finally finished the insolvency proceedings there. I think that there is no ground at all for any such order being made. But it may be open to the Official Assignee of Rangoon at some future date to satisfy the Insolvency Court here that some stay should be granted in respect of some part of the proceedings, though on the facts at present before me I am quite clear that I should refuse to make any such order. The effect of setting aside the order annulling the adjudication, will result in the whole of the order being set aside. Under that order some provision was made for the costs of the Official Assignee, Madras, out of the assets. Of course, those costs which he has received will be a matter for which he will be accountable to the insolvency Court here. It will be for the insolvency Court here to say whether those costs are costs which he has properly incurred and whether those costs should come out of the estate. Meanwhile, he will re-

The Official Assignee of Madras *v.* The Official Assignee of Rangoon

Sir Walter Schwabe, C. J.

tain what he has got as part of the assets of the insolvent in his hands ; whether the amount will be available for distribution is a matter for the insolvency Court and not for us.

It was contended on behalf of Annamalai Chetty and on behalf of the Official Assignee of Rangoon that the order of the Rangoon Court refusing to adjudicate Annamalai a bankrupt on the ground that he was not a member of the firm which had been declared insolvent in Rangoon was a final order under S. 41 of the Indian Evidence Act of 1872, which conferred upon or took away from Annamalai Chetty a legal character and, therefore, being made by the insolvency Court, it was a judgment in *rem* binding on all the world, whether the parties in subsequent proceedings were represented before the Court or not. In my judgment, this is not an order conferring upon Annamalai Chetty, or taking away from him, any legal character. It did decide and decide finally that, as far as the Rangoon Insolvency was concerned, Annamalai Chetty was not an insolvent. It is true that it based that finding on the view that he was not a partner ; but I do not think that being a partner in a firm is a legal character within the meaning of S. 41. Further, we are now sitting to review the decision of this Court made in 1918 and we have to say what order that Court ought to have made then. At that time there was before the Court an order of this Court in insolvency that Annamalai was a partner, and I do not think that it is open to him on an application of this nature to say that subsequently it has been held by some other Court in another insolvency that he was not a partner in the firm. The result of holding otherwise would be extraordinary. In this case the way the Court in Rangoon arrived at its decision was by saying that Annamalai Chetty was a member of the joint family and that he had disclaimed any interest in the joint family property as against his creditors, that there was no evidence before it that he was a partner and, therefore, it declared that he was not a partner. It would be a very remarkable thing if that is a binding decision on all the world that a partnership did not exist. For instance, if a creditor, here or elsewhere, were taking proceedings against Annamalai on the basis of the partnership, he could set up the decision of the Rangoon Court as a judgment in *rem* binding on the party here who was not a party in Rangoon. I do not think that was the intention of S. 41 at all nor do I think that the subsequent decision of the Rangoon Court is relevant

The Official Assignee of Madras v. The Official Assignee of Rangoon

Sir Walter Schwabe, C. J.

to what we have to consider, namely, the position that existed before the Rangoon Court gave that decision.

I propose to order the costs of this petition to be paid by the Official Assignee of Rangoon except in so far as those costs have been incurred owing to the intervention in the matter by Annamalai Chetty. So far as the costs incurred in the inquiry as to whether Annamalai Chetty was a partner or not are concerned and whether the firm carried on business within a year, the petitioner will get those costs against Annamalai Chetty. As regards the scale, I am clear that this is a case of special difficulty and importance, and I am clear that this is a proper case to direct that a higher fee than the ordinary fee should be admissible and that two sets of fee should be allowed, whether or not it comes under our powers to so order is a matter which I am prepared to hear further argued, but I am not at present prepared to make any order.

Ramesam, J.

Ramesam, J. :—I agree and have nothing to add.

[C. M. P. Nos. 3235 of 1923 and 1546 of 1923 are not necessary for the purpose of this report.]

This petition coming on again for hearing for further arguments as to costs on Friday the 16th day of November, 1923 and this day (Wednesday the 21st November, 1923),

The Court delivered the following

Sir Walter Schwabe, C. J.

JUDGMENT *The Chief Justice* We have now heard further arguments on the question of the fees payable to a Vakil on an insolvency appeal, and the question is whether he is, or when more than one is employed, they are confined to the scale of fees payable to Vakils under the Appellate Side Rules. One of those rules is rule 41 of Appendix II to those rules. By that rule, on the appellate side of the High Court (except in appeals from the Original Side) in cases of special difficulty or importance, certain extra fees are payable to the Vakils if so ordered. If this appeal to us is an appeal from the Original side within the meaning of that rule, it would seem to follow that the Vakil would be relegated to the ordinary scale for Vakils on the Appellate Side without the privilege of having a higher fee allowed in a suitable case.

Now, insolvency is a branch of work which is conducted by a particular Judge on the Original Side and has its own set of rules with statutory force. One of those rules is R. 137 which, in effect, makes the High Court Fee Rules applicable in insolvency except certain specified rules, one of which is R. 63.

The Official Assignee of Madras v. The Official Assignee of Rangoon

Sir Walter Schwabe, C. J.

Rule 63 of the High Court Fee Rules is the rule, and the only rule, which provides for the scale of fees payable to Vakils on appeals, and by rule 137 of the Insolvency Rules, for some reason, that rule was in terms made not applicable to insolvency matters. It is quite possible that the reason for it was that, in insolvency matters on the original side, Vakils have no right of audience and it is possible, though I do not think it right to speculate on the reason for the legislature making that omission, that the omission of that rule in terms was due to the fact that Vakils do not appear in insolvency in the Court of first instance. However that may be, R. 63 does not apply in Insolvency.

The next thing to be observed is that the Original Side rules, which govern the practice and procedure on the Original Side by the preamble are made to apply to varied jurisdictions of the Original Side, ordinary original, admirality, testamentary, matrimonial, and to appeals from judgments, decrees and orders in the exercise of such jurisdictions, but there is no mention of insolvency jurisdiction, the reason no doubt being that insolvency jurisdiction is governed by rules of its own, and, insolvency matters were therefore left out of the ordinary rules applicable to the Original Side altogether.

Taking those facts into consideration, one has to consider what was the intention of rule 41 dealing with practioners' fees and whether, in excepting appeals from the Original Side from those cases where the privilege obtaining a higher fee is in proper cases allowed, and whether it was intended to exclude at the same time appeals from insolvency. I think not. I think that the proper construction of R. 41 is that "Original Side" means the Original Side when exercising the jurisdiction referred to in the preamble to the Original Side Rules, and that it was not intended to have and has no application at all to insolvency. That being so, the privileges under rule 41, in my judgment, extend to appeals from insolvency.

I think this is a case of special difficulty and importance. and it is right that there should be a special order as to costs, and it is a case in which a higher fee should be allowed than would ordinarily be admissible : and it is certainly a case where it was right to employ more than one Vakil and a case in which two sets of fees should be allowed. We had figures before us in this case and we think that the right direction to the Taxing

Officer in this case is that he should allow to the Vakils employed jointly a sum of Rs. 3,000.

Ramesam, J. :—I agree.

T. S. V.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—MR. JUSTICE RAMESAM AND MR. JUSTICE JACKSON.

Taduri Ramachandra Jagannatharao v. Vadrevu Viswesam

Taduri Ramachandra Jagannatharao and others ... *Appellants** (*Defendants*)

v.

Vadrevu Viswesam ... *Respondent* (*Plaintiff*).

Hindu Law—Debts—Partition—Liability of sons and their shares after partition for the pre-partition debts of their father—Relinquishment of his share by father and a provision for his maintenance—Whether father continues joint afterwards.

A son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition, impleading also the son, for the father's debts incurred before the partition and not illegal or immoral. 24 Mad 555 and 38 Mad 1120 followed. 41 Mad 136 considered. 40 M L J 473 dissented from.

A family does not continue to be joint in cases where there is a relinquishment by the father of his share-subject to a provision for maintenance.

I L R 6 Mad 71 doubted.

Appeal against the decree of the District Court of Godavari at Rajahmundry in O. S. No. 10 of 1920.

T. M. Krishnaswami Iyer and *N. Rama Rao* for appellants.

S. Varadachariar, T. S. Raghunatha Rao and *V. Viyanna* for respondents.

The Court delivered the following

Ramesam, J.

JUDGMENTS :—*Ramesam, J.* :—Suit by the plaintiff to recover (1) a sum of Rs. 2,500 deposited with 1st defendant on 6th July 1917 and (2) a sum of Rs. 350 payable to plaintiff for money paid for 1st defendant. The defendants 2 to 5 are the sons of 1st defendant who formed with him, members of a joint family up to 1918. In that year a suit was filed by the present 2nd defendant against his father and brothers for partition. No written statement was filed and the suit was compromised and a decree was passed in terms of the compromise on 23—1—1920. Under the compromise, provision was made for paying off most of the debts contracted by the 1st defendant but not the suit debt. No specific properties were allotted to the 1st defendant and it was arranged that a maintenance of Rs. 30 should be paid to him every month.

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*Appeal No. 175 of 1921. 11th February, 1924.

Taduri Ramachandra Jagannatharao v. Vadrevu Viswesam

Ramesam, J.

The present suit was filed on 6—7—1920 and the defendants 2 to 5 are sought to be made liable with reference to the shares in their hands of what had been prior to 1920, joint family property. The defendants denied the genuineness of the debts. The District Judge found that the debts were true. He had doubts about the *bona fides* of the partition, but on the ground that under the compromise it was agreed that all the debts of the 1st defendant were agreed to be paid by all the defendants, decreed the suit. All the defendants appealed. The 1st defendant died during the pendency of the appeal. With the construction of the terms of the compromise by the District Judge, we are not able to agree.

The other appellants do not question the correctness of the finding that the debts are true. Nor do they say that the debts are illegal or immoral. They contend that the sons are not liable for the father's debt (not charged on the property) after partition and rely on *Karri Venkatareddi* v. *Chelluri Satyanarayanamurthi* (1) following *Peda Venkanna* v. *Sreeneevasa Dikshathulu* (2). The respondent replies that the partition is not *bona fide* within the meaning of the exception recognised in these cases and if the partition is held *bona fide,* he contends that *Karri Venkata Reddi* v. *Chelluri Satyanarayanamurthi* (1) is incorrectly decided and as to *Peda Venkanna* v. *Sreeneevasa Dikshathulu* (2) while conceding that the actual decision is correct, in so far as it rests on any ground other than the ground that the pronote in that case was renewed by the father after partition, such ground is not correctly decided.

We are of opinion that the partition by the decree of 1920 was *bona fide* in the sense that the intention was to really divide the status of the parties ; it is probably also *bona fide* though the matter has not been fully gone into, in the sense that there has been no unequal allotment of properties if we regard all the debts as debts of 1st defendants only *i. e.*, that his share, minus all the debts would have been much less than what he actually got *viz.*, an annuity of Rs. 360 and we come to this conclusion in spite of the fact that there has been no division by metes and bounds and the decision in *Appa* v. *Ranga* (3) is doubtful, if it meant to decide that the family continues joint in cases where there is a relinquishment by the father subject to a maintenance. It is not *bona fide* only in the sense, that provision was not made for all the debts of 1st defendant not illegal

1. (1920) 40 M L J 473. 2. (1917) I L R 41 M 136 : 33 M L J 519.
3. (1882) I L R 6 Mad 71.

Taduri Ramachandra Jagannatharao v. Vadrevu Viswesam

Ramesam, J.

and immoral (Ghose's Hindu Law Vol. 1 page 438) out of the whole joint family properties from which they would have been recoverable if there had been no partition and debts like the plaintiffs will be defeated if it is held that the defendants 2 to 5 are not liable. As it is doubtful whether the exception mentioned in the cases uses the expression '*bona fide*' in this sense, we had to consider the question of the correctness of the decisions relied on.

It may be that, under the primitive Hindu Law, a son is under a pious duty to discharge his father's debts irrespective of the devolution, on him, of any kind of property. But the decisions have established the principle that a son is not liable unless the self-acquired property of the father or property which had been joint between them has devolved upon the son. For the purposes of this case, it is not necessary to go further behind the case of *Girdharee Lal* v. *Kantoo Lal* (4) at p. 331, their Lordships quote from Knight Bruce L. J. in *Hanuman Prasad Panday* v. *Mussumat Baboee* (5) "Unless the debt was of such a nature that it was not the duty of the son to pay it, the discharge of it even though it affected ancestral estate, would still be an act of pious duty in the son. By the Hindu Law the freedom of the son from the obligation to discharge the father's debt has respect to the nature of the debt and not to the nature of the estate, whether ancestral or acquired by the creator of the debt" and say "That is an authority to show that ancestral property which descends to a father under the Mitakshara law is not exempted from liability to pay his debts because a son is born to him. It would be a pious duty on the part of the son to pay his father's debts, and it being the pious duty of the son to pay his father's debts the ancestral property, in which the son as the son of his father acquired an interest by birth, is liable to the father's debts." At page 334, effect was given to these observations, in *Muddun Thakur's case* in favour of a creditor in execution. While the Calcutta High Court gave full effect in a case from Bengal in *Suraj Bunsi Koer* v. *Sheo Persad Singh* (6) the Madras High Court at first did not, on the ground that the decision in 1 I. A. 321 cannot apply to Madras where a member of a joint family has a right to alienate his share (unlike Bengal) and there is

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(1874) 1 I A 321. 5. (1856) 6 M I A [illegible].

6. (1879) I L R 5 C 148 (P C)

Taduri Ramachandra Jagannatharao v. Vadrevu Visweswaram. — Ramesam, J.

no need for the equitable right, recognised in favour of the executing creditor in 1 I. A. 321. The creditor carried the case to the Privy Council (*Muttayan* v. *Zamindar of Sivagiri* (7). Meanwhile a Full Bench of the Madras High Court in *Ponnappa Pillai* v. *Pappu Iyengar* (8) (Muthuswami Iyer, J. who decided the earlier case and Innes J. dissenting) held that the decision in 1 I. A. 321 applied to Madras equally. The Privy Council in *Muttayan* v. *Zamindar of Sivagiri* (7) while deciding the case on another point, pointed out that there was no ground for not applying the decision in 1 I. A. 321 to Madras. In *Ramaswami Nadan* v. *Ulaganatha Goundan* (9) a Full Bench held that the liability of the father and son was co-extensive and the cause of action against the son arose simultaneously with that against the father though it must be added that the son cannot be sued alone during the father's life. *Periaswami Mudaliar* v. *Seetharama Chettiar* (10). In *Krishnaswami Konan* v. *Ramaswami Iyer* (11) the question arose whether in execution of a decree obtained against the father alone, the share of the son in the joint family property allotted to him in a partition can be seized in execution. The District Judge (afterwards Miller, J.) held "when the separation is before the suit as in this case, I think the creditor is bound to make parties all those whose interests he wishes to bind by his decree. The property is, from the date of separation, the son's property, in which the father has no interest, and though *the son may be liable to pay the debt,* his liability must be enforced in a suit against himself." Incidentally it may be observed that the son's share, even after partition may and is spoken of in this and other cases as ancestral property and even joint property (in the sense that it represents what had been joint property). It is indeed ancestral property in the hands of the son as against his own sons. The High Court said "The principle upon which the son cannot object to ancestral property being seized *in execution for an unsecured personal* debt of the father is that the father, under the Hindu Law is entitled to sell on account of such debt the whole of the ancestral estate. This necessarily implies that at the time *the property is seized,* it remains the undivided estate of the father and son Ergo,

7. (1882) I L R 6 M 1.
8. (1881) I L R 4 M 1.
9. (1898) I L R 22 M 49 : 8 M L J 312.
10. (1903) I L R 27 M 243 : 14 M L J 84 (F B).
11. (1899) I L R 22 M 519 : 9 M L J 127.

property taken by the son in partition cannot be seized on account of such unsecured personal debt of the father, even though the debt had been incurred before the partition. Of course if the partition had been made with a view to defraud or delay creditors it would be otherwise, but no such case is made out here" This is the first case which considered the effect of a partition.

The whole decision and the exception in case of a *mala fide* partition relate to the seizure in execution of a decree to which the son was not a party. In *Ramachandra Padayachi* v. *Kondayya Chetty* (12), the sons were parties to the suit and it was held (Bhashyam Aiyangar, J. being one of the Judges) that the son was liable to the extent of the family property which had come to him under the partition. *Krishnaswami Konan* v *Ramaswami Iyer* (11) was thus distinguished, at page 557. "In that case the suit was brought after partition against the father alone and the point decided was that property taken by a son under a partition effected before the suit could *not be seized in execution of a decree obtained against the father only in such suit.* The case turned on the plaintiff's rights *in execution* not as here on the question whether the plaintiff is entitled to Judgment as against the son." The next case is *Kameswaramma* v. *Venkatasubba Rao* (13) (Wallis, C. J. and Oldfield, J.). In my opinion the reasoning in this case is conclusive against the appellants. The learned Judges say "I think it is also clear that plaintiff as a Hindu son is liable for the debt to the extent of the *joint family* property which came to his hands at partition [*Ramachandra Padayachi* v. *Kondayya Chetty* (12)]." They quote the sentence I already quoted from *Krishnaswami Konan* v. *Ramaswami Aiyar* (11) and say "That necessarily implies that at the time the property *is attached,* it remains the undivided property of the father and son. The same view has been taken under very similar circumstances (Miller and Krishnaswami Aiyar, JJ.) in *Lakshmi Chettiar* v. *Govindarajulu Naidu* (14), see also *Rathna Naidu* v. *Aiyana Chariar* (15) At the *date of the execution* the property now in question had ceased to be joint family property and the cases referred to on the other side are cases in which the property remained joint and

11. (1899) I L R 22 M 519 : 9 M L J 127. 12. (1901) I L R 24 M 555.
13. (1914) I L R 38 M 1120. 14. (1910) 8 M L T 349.
15. (1890) 18 M L J 599.

Taduri Rama-chandra Jagannatha-rao v. Vadrevu Viswesam

Ramesam, J

so subject to alienation by the father in *satisfaction of the debt.*" Incidentally it may be mentioned that the case in *Rathna Naidu* v. *Aiyana Chariar* (15) is one where the father mortgaged his son's share after partition. Obviously he has no such power and the case cannot help the point under discussion. Now comes the case in *Peda Venkanna* v. *Sreenivasa Deekshathulu* (2). The point elaborately argued in that case and also elaborately discussed is whether *Sahu Ram's case* (16) effected any change in the law relating to the son's liability a point which, after giving rise to Full Bench decisions in this Court, is set at rest by Lord Dunedin's Judgment in *Raja Brij Narain Rai* v. *Mangla Prasad Rai* (17) (a Judgment of a Full Board of the Privy Council) ; while deciding that it did not, Wallis, C. J. said " This Court has held in a series of cases that as the effect of partition is to put an end to the father's right to sell the son's share for an antecedent debt it also puts an end to the creditor's right to *bring the son's share to sale* during his lifetime at any rate when the partition has not been effected to defeat and delay creditors *Krishnaswami Konan* v. *Ramaswami Iyer* (11), *Kameswaramma* v. *Venkatasubba Rao* (13) " Having regard to the expression " to bring the son's share to sale and to the fact that *Kameswaramma* v. *Venkatasubba Rao* (13) was cited in support of his Lordship's proposition and without any qualification or disapproval, it is impossible to say, solely because, lower down the page His Lordship used the expression " to say nothing of the further ground, etc., " that His Lordship impliedly intended to over-rule his own opinion in *Kameswaramma* v. *Venkatasubba Rao* (13) following *Ramachandra Padayachi* v. *Kondayya Chetty* (12). Kumaraswami Sastri, J. begins by saying he agrees with the Judgment of the Chief Justice on the narrower ground " that a son is not after partition liable to be *proceeded against* in respect of a personal debt incurred by the father before partition. " If " proceeded against " meant "proceeded against in execution" there is no difficulty in accepting the statement but if it meant, as it was intended to mean, " proceeded against in suit " it is not justified, I say with great deference to my learned brother,

16. 44 I A 126. 17. (1924) 46 M L J 23.
15. (1890) 18 M L J 599. 2. (1917) I L R 41 M 136.
11. (1899) I L R 22 M 519 : 9 M L J 127. 13. (1914) I L R 38 M 1120.
12. (1901) I L R 24 M 555.

Taduri Ramachandra Jagannatha-rao v. Vadrevu Visweśam, — Ramesam, J.

by Wallis, C. J.'s expression "to say nothing of the further ground" and by imputing to it a significance inconsistent with the earlier statement of the law following *Kameswaramma* v. *Venkatasubba Rao* (13). His Lordship then reviews the cases at page 143. It is difficult to see how it can be said that *Rathna Naidu* v. *Aiyana Chariar* (15) followed *Krishnaswami Konan* v. *Ramaswami Aiyar* (11). He then distinguishes *Ramachandra Padayachi* v. *Kondayya Chetti* (12) by saying that "the debt sued on arose out of a joint family business carried on by the father and son before partition and the liability of the son rested. . .on contract entered into in respect of a joint family trade to the extent of the joint family assets, etc." I am not able to follow the distinction. If the son was a party to the contract, he is liable not only as to the joint family property but even as to his self-acquired property and unless he is a minor, he is liable to be arrested. In other words, he is personally liable and there is no question of Hindu Law in the case. If he was not a party, this liability rests only on the Hindu Law relating to son's liability on the contracts of a father or manager. Suppose the family trade is not ancestral trade but a new trade started by the father and cannot therefore be said to be for justifiable necessity, can it be said that *Ramachandra Padayachi* v. *Kondayya Chetti* (12) does not apply to such a case. No such distinction was made in *Kameswaramma* v. *Venkatasubba Rao* (13) which is not the case of a family trade. He then refers to the renewal of the note by the father. In my opinion the case in *Peda Venkanna* v. *Srinivasa Dikshitalu* (2) is correctly decided so far as it rests on the ground that the note sued on was renewed by the father after partition. Wallis, C. J. did not intend to over-rule *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13), or even to distinguish *Ramachandra Padayachi* v. *Kondayya Chetty* (12) in the manner suggested by Kumaraswami Sastri, J. In these circumstances we cannot accept the decision in *Karri Venkata Reddi* v. *Satyanarayanamurthi* (1) as binding on us as it rests solely on the ground that the matter was concluded by *Peda Venkanna* v. *Srinivasa Deekshathulu* (2). Our brother Oldfield, J. who

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13. (1914) I L R 38 M 1120.
15. (1890) 18 M L J 599.
11. (1899) I L R 22 M 519 : 9 M L J 127.
12. (1901) I L R 24 M 555.
2. (1917) I L R 41 M 136.
1. (1920) 40 M L J 473.

Taduri Ramachandra Jagannatharao v. Vadrevu Viswesam.

Ramesam, J.

was also a party to *Kameswaramma* v. *Venkatasubba Rao* (13) made no reference to it in the later case and gave no additional reasons. Abdur Rahim, J. simply said that all the cases were considered by *Peda Venkanna* v. *Srinivasa Deekshathulu* (2) We are also referred to an unreported decision in A. S. No. 419 of 1918 by Abdur Rahim and Phillips, JJ. It purports to follow *Peda Venkanna* v. *Srinivasa Deekshathulu* (2) and concurs with Kumaraswami Sastri, J. in his distinction of *Ramachandra Padayachi* v. *Kondayya Chetti* (12). I have already dealt with this. This case does not add to the other cases. We are of opinion that *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13) were not over-ruled and following them, we hold that a son in possession of property which had been joint and which fell to his share in partition is liable in a suit brought after partition (impleading the son also) for the father's debts incurred before the partition and not illegal and immoral (see also Strange's Hindu Law, Vol. 1, page 191).

We do not think it necessary to refer the question to a Full Bench. On this ground, the appeal is dismissed with costs.

Jackson, J. :—I agree.

The point is correctly appreciated in Dr. Gour's Hindu Code, S. 118, paragraph 311 with reference to *Ramachandra Padayachi* v. *Kondayya Chetti* (12) and *Kameswaramma* v. *Venkatasubba Rao* (13). "On separation the son is liable for debts incurred before partition." But in Trevelyan's Hindu Law, 2nd Edition, page 308, the point is not stated so clearly. "A creditor cannot enforce the payment of the debt of the father against property which has been allotted on partition to the son." This would be correct if "enforce in execution" is meant and not correct if it also includes 'enforce by suit.'

In Mayne's Hindu Law, 9th Edition, page 411, it is stated "where the son is joined in a suit against the father this is for the purpose of enabling the Court to exercise the power of the father to sell family property in discharge of his debts not being illegal or immoral and to prevent the son from questioning the nature of the debt in execution proceedings against the property. After partition, of course, the son holds the share which is allotted to him free from any such liability." If

2. (1917) I L R 41 M 136.
12. (1901) I L R 24 M 555.
13. (1914) I L R 38 M 1120.

Taduri Ramachandra Jagannatharao v Vadievu Viswesam. — Ramesam, J.

'Any such liability' be taken to mean attachment in execution proceedings the passage presents no difficulty but if the words mean free from any liability for such debts the statement seems to go too far.

C. A. S. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE LORD BLANESBURGH, AND LORD SALVESEN.

Kalyandappa Bin Ayappa Desai, since deceased (now represented by Ayappa Bin Kalyandappa Deshmukh and others) *Appellants*

v.

Chanbasappa Bin Dodappa Desai *Respondent.*

On Appeal from the High Court of Judicature at Bombay.

P.C — Desai v. Desai

Hindu Law—Adoption—Death of adopted son leaving a widow—Adopting mother making a second adoption during widow's lifetime—Adopted son in possession of property to knowledge of plaintiff—Suit by reversioner of first adopted son to recover property—Challenging second adoption brought after six years—Limitation Act (IX of 1908), Arts 118 and 141—Limitation Act, 1877, Arts. 118, 119 and 144 to Sch. 2—Limitation Act, 1871, Arts. 129 and 142.

In a suit for possession involving the invalidity of an adoption, the period of limitation is 12 years, under Art. 144 of the Limitation Act XV of 1877, and not under Art. 118.

Jagadamba Chowdhrani v. *Dakhina Mohun,* 13 I. A. 84 ; *Mohesh Narain Moonshi v. Taruck Nath Moitra,* 20 I A 30 ; *Shrinivas* v. *Hanmaut,* I L R 24 Bom 260 ; *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshevan Baksh Singh,* 33 I A 156 ; *Velaga Mangamma* v. *Bandlamudi Veerayya,* I L R 30 M 308 ; *Muhammad Umar Khan* v. *Muhammad Niazuddin Khan,* 39 I A 19 ; *Shrinivas Sarjerav* v. *Balwant Singh Venkatesh,* I L R 37 Bom 513 ; *Venkata Narayana Pillai* v. *Subbammal,* 42 I A 225 ; *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi,* 34 I A 87, referred to.

Appeal from a decree of the High Court of Bombay, reversing a judgment of the First Class Subordinate Judge at Bijapur, decreeing the plaintiffs' suit.

The property in dispute consisted chiefly of *Watan* property (*Desgat and Gaudki Watans*), belonging to one Doddappa bin Kuntappa Desai, who died in 1878, leaving two widows (Malkamma and Baslingamma the elder) and a daughter (Shidlingawa) by Malkamma, but no son. Malkamma, the

senior widow, adopted one Madivalappa (the son of Shidlingawa) in 1880, and his name was entered by the Collector of the district as holder of both classes of Watans. In 1886, his name was removed from the *Desgat Watan* register on the ground that he was not a *Bhauband* of Dodappa, in whom, under the *Sanad*, the *Desgat Watan* would vest. Madevalappa died a minor in 1895, leaving no issue, but a widow (Baslingamma the younger) who was a minor, and whose name was entered as holder in the *Gaudki Watan* register, until it was removed therefrom by and in favour of Malkamma on the 4th October, 1899.

On the 14th December 1901, Malkamma adopted the defendant as son to Dodappa, and obtained possession of both classes of the *Watan* property.

Baslingamma the younger (Madivalappa's widow) died in 1903. In consequence thereof, the plaintiff claimed to be entitled to the property, and on the 1st July, 1912 instituted this suit to recover possession thereof, claiming to be the nearest *Bhauband* of Madivalappa, and, as such, his heir after his widow's death.

The defendant, by his written statement, on the 30th June 1913, pleaded *inter alia* that (1) he was the legally adopted son of Dodappa, and that the plaintiffs' suit was barred by Arts. 118 and 119 of the Limitation Act (No. 15 of 1877); (2) the suit was also barred by Art. 144 of the said Act, in so far as the property in suit had been in the adverse possession of Malkamma for a period of more than 12 years.

The Subordinate Judge (K. N. Bhide Esq.) of Bijapur made a decree in appellant's favour (16th November 1914) holding that there was no adverse possession, and Arts. 118 and 119 of the Limitation Act did not apply: but the High Court of Bombay on appeal (Sir Basil Scott, C. J. and Sir John Heaton, J.) reversed this decree, and dismissed the appellant's suit (13th April 1917). (The proceedings in India have been reported in I. L. R. 41 Bombay 728). The plaintiff appealed to his Majesty in Council.

11th February 1924. *Raikes* for appellant.

Wallach for respondent.

13th March, 1924. The Judgment of the Board was delivered by

LORD PHILLIMORE:—The suit in this case was brought in the Court of the Subordinate Judge of Bijapur to recover possession of certain *watan* lands and other lands of ordinary

Lord Phillimore

P. C.

Desai
v.
Desai.

Lord
Phillimore.

tenure, the plaintiff making a claim as the nearest agnate to the last male owner, and averring that his title accrued on the death of the latter's widow. The principal defendant, the now respondent, being in possession of the property, pleaded various defences of which the one which is important for present consideration, depends upon the Indian Limitation Act.

The palintiff recovered Judgment before the Subordinate Judge for possession of the *watan* lands, but not of the lands of ordinary tenure. Appeal was taken to the High Court of Judicature at Bombay, which reversed the decision of the Subordinate Judge and gave Judgment for the defendant.

From this decree, the representatives of the original plaintiff have appealed to His Majesty in Council. As to the non *watan* lands, the plaintiff acquiesced in the decision of the Subordinate Judge against him. Of the watan lands, there were two kinds and it was contended for the defendant that, as regards one kind, known as *Desgat watans,* he was in a more favourable position than with regard to the others and must in any event succeed. But the Subordinate Judge and the High Court agreed, though for somewhat different reasons, that the parties stood in the same position with regard to both kinds of *watan* lands. Their Lordships do not find it necessary to go into reasons given by the Subordinate Judge, but they are satisfied, upon the ground given in the judgment of the High Court, that the defendant was in no better position with regard to the *Desgat watans* than he was with regard to the other *watan lands*. But as regards both classes of *watans,* there is, as the High Court observed, a serious defence under Article 118 of the Indian Limitation Act.

The facts of the case can be stated in a comparatively short compass. The plaintiff was cousin to the former owner, of this property, by name Dodappa. Dodappa married Malkamma, the second but not contesting defendant in the case, and died long ago. The plaintiff averred that, after Dodappa's death in the year 1880, Malkamma took in adoption to him as his son, one Madivalappa, who was her daughter's son : that Madivalappa married Basalingamma and died himself in 1895 : that upon his death, Baslingamma took the ordinary Hindu woman's estate and died in 1903 and that upon her death, plaintiff's title accrued and that as he brought his suit on 1st July, 1912, he had brought it within the period of 12 years allowed to him by Article 141 in the Second Schedule to the Limitation Act.

P. C.
Desai
v.
Desai
Lord Phillimore

He stated in his plaint that the defendant denied the validity of Madivalappa's adoption and set up that he, on the other hand, was the person validly adopted by Malkamma as son to Dodappa.

The defendant No. 1 did in substance set up this case. He admitted some show of adoption of Madivalappa, but denied that it was legal or valid ; and he set up his own adoption by Malkamma in 1901. In the proceedings in the first Court, the validity of the adoption of Madivalappa was in contest ; but the Subordinate Judge decided that it was valid ; and this validity was not disputed in the appeal to the High Court. If Madivalappa were validly adopted, the property passed to him at once upon the adoption ; and when he, the adopted son, died, his heir should succeed subject to the estates of the two widows. The adoption, therefore, of the first defendant, if it can be enquired into at all, must be pronounced either invalid or ineffectual, and such as to confer no title upon the first defendant to the lands in suit.

The point of law as between the two parties can be stated as follows Plaintiff says " I deduce a good title. You have no right to possession as against me, and I bring my suit within 12 years, that being the period allowed to me by Art. 141 in the First Schedule of the Limitation Act, which provides that for a suit by a remainderman or a reversioner 'entitled to the possession of immovable property on the death of a Hindu female,' there is a period of 12 years from the time 'when the female dies.' "

The defendant says " You can try to put it in that way but in truth your suit is one governed by Article 118, being one 'to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place,' for which you have only six years from the date 'when the alleged adoption becomes known to the plaintiff' ; and as regards knowledge, I can show you knew of my claim (as indeed he could show) more than six years ago."

It is true that the plaintiff in his plaint as originally framed claimed a declaration that the defendant had not been validly adopted, which was imprudent. But he wisely asked to amend this plaint as striking out this claim and making the suit a plain one for possession, and this amendment was allowed.

The controversy as to which of the two principles of limitation should be applied in cases of this nature is an old one,

P. C.

Desai v. Desai

Lord Phillimore

and has given occasion to many decisions, some of which are in conflict. Some of these authorities amount to decisions on the exact point, which, if they are decisions of this Board, must be accepted as conclusive. Others may be said to consist of *dicta* rather than actual decisions ; and others are again decisions of the High Courts in India, and, as such, entitled to much respect, but in no way binding upon their Lordships.

The earlier of these decisions turned upon the construction of the Act of 1871. The article in the schedule of that Act, which dealt with cases of adoption, was in different language from the article in the schedule of the Acts of 1877 and 1908, the two latter being identical in terms.

The Article in the Act of 1871, No. 129, is expressed as follows :—

"To establish or set aside an adoption—twelve years from the date of the adoption, or (at the option of the plaintiff) the date of the death of the adoptive father."

It will be shown hereafter that not only is the description of the suit different from that contained in Article 118 of the two later Acts, but that the time from which the limitation begins to run is different.

However, as regards the earlier Act, the decisive authority is a decision of this Board in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1). In that case, their Lordships held that the words " to establish or set aside an adoption " " were not technical words and did not describe with accuracy any known form of suit," and that therefore any suit which brought the validity of an adoption into question must be considered as a suit to set aside an adoption, even though it might also be looked at as a suit by the man entitled to recover possession ; and that, therefore, Article 129, and not Article 142 (as then numbered), applied.

In the course of their judgment, their Lordships made a reference to the Act of 1877, which by that time had been some years in force, though the case had been started so long ago that it was governed by the earlier Act of 1871. These observations are as follows :—

" It is worth observing that in the Limitation Act of 1877, which superseded the Act now under discussion, the language is changed. Art. 118 of the Act of 1877, which corresponds to Art. 129 of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit

1. (1886) L R 13 I A 84.

P. C.

Desai v. Desai

Lord Phillimore

of the Act of 1871 so far as regards setting aside adoptions, speaks of a suit 'to obtain a declaration that an alleged adoption is invalid or never, in fact, took place,' and assigns a different starting-point to the time that is to run against it. Whether the alteration of language denotes a change of policy, or how much change of law it affects, are questions not now before their Lordships. Nor do they think that any guidance in the construction of the earlier Act is to be gained from the later one, except that we may fairly infer that the Legislature considered the expression 'suit to set aside an adoption' to be one of a loose kind, and that more precision was desirable."

The next case to be cited is that of *Mohesh Narain Moonshi* v. *Taruck Nath Moitra* (2), in which it was endeavoured to argue that the Act of 1877, and not the Act of 1871, applied ; but it was held that the defendant had established his right before ever the Act of 1877 came into force, and was therefore (though his adoption was an invalid one) entitled to insist upon the Limitation Act of 1871 in his favour. In this decision, there was again a reference to the Act of 1877, and the words used by their Lordships were as follows

"It was suggested that, the Act of 1871 having been superseded by the Act of 1877, the question of limitation should be determined with reference to the provisions of the latter statute, in which the language used is somewhat different, the suit there referred to as necessary to save the limitation being described as one 'to obtain a declaration that an alleged adoption is invalid, or never, in fact, took place.' It seems to be more than doubtful whether, if these were the words of the statute applicable to the case, the plaintiff would thereby take any advantage."

But then their Lordships proceeded to give the reason why the Act of 1877 would not apply.

In neither of these cases did their Lordships intend to pronounce any decision on the construction of the Act of 1877. Perhaps it might be observed that there is a shade of inclination in the passage of the first judgment towards there being a definite change in the law, and a shade of inclination in the opposite direction in the second judgment.

When the Act of 1877 came to be applied, there were differences of opinion in the various High Courts in India. The authorities are somewhat evenly balanced. Their Lordships, however, deem it unnecessary to go into the detail of any of the cases which preceded the next judgment of this Board, except the very important decision of the Full Bench in the Bombay High Court presided over by Sir Lawrence Jenkins, C. J., and decided in the year 1899. The case is reported as *Shrinivas* v.

2. (1892) L R 20 I A 30.

P. C.

Desai v. Desai

Lord Phillimore

Hanmant (3). It was there held, partly on grounds of public policy, partly in supposed obedience to the judgments of this Board, and partly in deference to the supposed indications of opinion by this Board, that the same rule should be applied to the Act of 1877 as to the Act of 1871, and that a suit to recover possession, which involved the decision of an issue as to the validity or invalidity of the defendant's adoption, was a suit to obtain a declaration that an alleged adoption was invalid or never took place, to which Article 118 of the Act of 1877 applied, and which therefore must be brought within a period of years dating from the plaintiff's knowledge, and was, in the particular instance, time-barred. The limit of time for these declaration suits, which was 12 years under the Act of 1871, had become 6 years under the Act of 1877.

In that suit, as in the present suit before it was amended, the plaintiff claimed a declaration that the adoption of the defendant was invalid, and he also claimed possession of the property, and, when pressed by Article 118, he endeavoured, as in the present case, to throw aside his claim for declaration and rely only on the claim for possession. But it was held that the real matter for decision was a question for adoption, and that, therefore, Article 118 applied.

As it was put by one of the learned Judges :—

> "Art. 141 applies to the ordinary simple case of a reversioner where the validity of the adoption is not the substantial point in dispute, or where the plaintiff can succeed without impugning the validity of the defendant's adoption."

Shortly afterwards, the case of *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4) came before this Board. In that case again, there was a conflict between the reversioner and a defendant claiming under an adoption which was held either non-existent or invalid by both Courts in India. Whereupon the defendant appealed ; but his appeal was dismissed. It should be observed parenthetically that, in the head-note to the report, the important word "not" is unfortunately omitted.

The conclusion arrived at in that case was shortly stated by Lord Macnaghten, who delivered the Judgment of the Board ; and their Lordships cannot do better than quote the passage in full :—

3. (1899) I L R 24 B 260. 4. (1906) L R 33 I A 156.

P. C.
Desai
v.
Desai
Lord Phillimore

"On the appeal before their Lordships it was argued that there was at any rate an apparent adoption, and that, on that assumption, it mattered not whether the adoption was valid or invalid, because there was enough to satisfy the provisions of the Limitation Act of 1871, as interpreted by this Board in the case of *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1) Mr. Cohen, who argued the case with great ability, relied entirely on the Act of 1871. He contended that the Limitation Act of 1877 did not apply because the appellant relied on title acquired before the passing of the Act of 1877, and his rights were therefore saved by S. 2 of that Act. He admitted that, if the Act of 1877 applied, his client was out of Court.

"Their Lordships are unable to accede to Mr. Cohen's argument. Giving full effect to the *Jagadamba Case* (1) and the other cases which followed it, they do not think that the immunity, such as it is, gained by the lapse of twelve years after the date of an apparent adoption, amounts to acquisition of title within the meaning of S. 2 of the Act of 1877.

"Their Lordships think that the appeal may be disposed of on this short ground, whether the alleged adoption was or was not an apparent adoption to which the ruling in the *Jagadamba Case* (1) would apply if the Act of 1871 were now in force."

This language looks at first sight conclusive in favour of the plaintiff in the present suit ; but it has been thought in subsequent cases in India, and has been argued before their Lordships, that the decision of this point was unnecessary, because the plaintiff, being a minor, had three years after attaining majority to bring his suit, and that this provision in his favour superseded the protection given to the defendant by Art. 118 and left the matter open to be decided according to Art. 141. This line of reasoning seems to assume that you cannot impute knowledge to a minor—a view which is certainly not in accordance with the facts of human nature. But it is not necessary to go so deeply into the matter. It is obvious from a perusal of both the arguments and Judgment that the minority of the plaintiff (though mentioned in the argument) was not the reason for the decision, and that the intention was to decide the same point as is contended for in the present appeal.

In consequence of this decision, the High Court of Madras in the case of *Velaga Mangamma* v. *Bandlamudi Veerayya* (5) went back upon its previous decision in *Ratnamasari* v. *Akilandamma* (3), decided in 1902, and held, in obedience to the decision of this Board, that Art. 118 only applied to declaratory suits in respect of adoption and not to suits for possession, and that, in suits for possession, Art. 141 was the proper one to apply.

1. (1886) L R 13 I A 84. 3. (1902) I L R 26 M 291.
5. (1907) I L R 30 Mad. 309.

P. C.
Desai
v.
Desai
Lord Phillimore

Next in order comes the decision of this Board in *Muhammad Umar Khan* v. *Muhammad Niaz-ud-din Khan* (6). That was the case of a Mahomedan adoption, in which the District Judge said that Art. 118 was inapplicable, as the adoption was "inherently invalid and *ipso facto* void ;" but the Chief Court reversed his decision and held that the adoption was not inherently invalid, and that Art. 118 applied, and the suit was barred by it.

The Chief Court did not, however, mean to hold that the adoption was valid ; because, if the Judges had thought that, there would have been no necessity to rely upon the doctrine of limitation. What the learned Judges meant was that it was an adoption with sufficient colour of title to have it treated as one which would have to be got out of the way by a plaintiff suing for possession, and therefore that the time limit applicable to suits for declaring an adoption invalid applied.

This decree of the Chief Court was affirmed by this Board upon other grounds, it is true ; but, in affirming it, their Lordships expressed themselves upon the point of limitation as follows :—

"Although their Lordships consider that the question of an adoption was an immaterial issue they think it advisable to say that the omission to bring within the period prescribed by Art. 118 of the Second Schedule of the Indian Limitation Act, 1877, a suit to obtain a declaration that an alleged adoption was invalid, or never, in fact took place, is no bar to a suit like this for possession of property. Their Lordships need only refer to *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). Under the general Mahomedan Law an adoption cannot be made ; an adoption if made in fact by a Mahomedan, could carry with it no right of inheritance.

"It may further be observed that, even if an adoption by a Mahomedan was permissible by any valid custom in the Punjab, the Chief Court found that it had not been proved that the parties to the suit belonged to a family to which the Punjab agricultural or other similar restrictive customs must be presumed to apply."

As against the weight of this authority, it has been observed that, generally speaking, a Mahomedan adoption does not confer any right of succession to property, as, indeed, their Lordships said in the passage just quoted. But, on the other hand, as the passage shows and the general trend of the case shows, there may be a tribal custom among Mahomedans (and this particular case came from the Punjab, which is the home

6. (1911) 39 I A 19 : 22 M L J 240. 4. (1906) L R 33 I A 156.

of customs) allowing adoption to carry rights of succession. Indeed, it was upon some such idea that the Chief Court had relied when it introduced Art. 118 as fixing the period of limitation.

That Hindu tribes converted in more recent times to Mahomedanism may keep as part of their customary law the old Hindu Law in respect of family matters and succession, is shown in the recent case of the Halai Memons in 1922, [*Khatubai* v. *Mahomed Hagi Abu* (7)].

Anyhow, it would seem that their Lordships desired to take this opportunity of elucidating and affirming their decision in the case in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4). In this connection it should be noted that, though the Judgment is stated to have been delivered by Sir John Edge, one of the members of the Board was Lord Macnaghten, who had delivered the Judgment in *Thakur Tirbhuwan Bahadur Singh* v. *Raja Rameshar Bakhsh Singh* (4), and must have known well what was intended to have been conveyed by the earlier Judgment and by this one.

In 1913, these Judgments came under consideration by the High Court of Bombay in *Shrinivas Sarjerav* v. *Balwant Venkatesh* (8) ; and the learned Judges came to the conclusion that, notwithstanding the passages in the two decisions of this Board which have been last cited, they were still bound by the principle expressed in the decisions on the Act of 1871 and they accordingly held that the period of limitation in a case like the present is that of six years from the knowledge of the adoption, differing on this point from the High Court of Madras. Their decision has been followed by the Court in the present case, the learned Judges observing that " the adoption of the defendant may be clearly invalid by Hindu Law and Malkamma's power of adoption may have been already exhausted ; nevertheless the law of limitation will effectively defeat the plaintiff's claim. "

Their Lordships are of opinion that the High Court of Bombay both in this and in the previous case attached too little weight to the authority of the last two Judgments of this Board, and further that the learned Judges seemed not to have noticed that, since the decision in *Thakur Tirbhuwan Bahadur*

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4. (1906) L R 33 I A 156.
7. (1922) 50 I A 108 : 44 M L J 35. 8. (1913) I L R 37 Bom 513.

P C

Desai
v.
Desai

Lord
Phillimore

Singh v. *Raja Rameshar Bakhsh Singh* (4), the Limitation Act of 1908 was passed by the Indian Legislature with this Article in precisely the same language as that used in 1877 after the construction already put upon it by this Board. This, in the view of their Lordships, is a point of considerable importance.

The matter might almost rest here ; but as this question has so often been raised and discussed, their Lordships would wish to put it upon the ground of principle as well as on the ground of authority. In the Act of 1871, as observed in the Judgment in *Jagadamba Chowdhrani* v. *Dakhina Mohun* (1), the words used had no technical meaning, and they were treated as expressing popular language to which, in popular reasoning, the meaning which prevailed could attach. In the Acts of 1877 and 1908, the matter is otherwise. The words " a suit to obtain a declaration " are terms of art. They relate back to the Specific Relief Act passed in the same year 1877, being Act No. I of that year, whereas the Limitation Act is Act No. 15. Section 42 of the Specific Relief Act deals with declaratory decrees, and the illustration (letter F) is much in point :—

> " A Hindu widow in possession of property adopts a son to her deceased husband. The person presumptively entitled to possession of the property on her death without a son may, in a suit against the adopted son, obtain a declaration that the adoption was invalid. "

It is to this class of suit that this particular limitation applies. The date from which the time begins to run is a subjective or personal date ; and the condition of obtaining the particular relief which is sought in a declaratory suit is that the plaintiff should not be guilty of laches, the measure of laches being fixed by the statute as six years. But if a claimant chooses to run the risk that an adoption which he has not attacked will have every presumption made in its favour by reason of its long standing, he can wait till his reversionary right has accrued, and even till the limit (no doubt a very wide limit) of 12 years from that accruer has passed.

Strange consequences would otherwise ensue. It was decided by this Board in *Venkatanarayana Pillai* v. *Subbammal* (9), in the year 1915, that a suit by a presumptive reversioner for a declaration that an adoption was invalid was one

1. (1886) L R 13 I A 84. 9. (1915) L R 42 I A 125 : 28 M L J 535.

P. C.
Desai
v.
Desai
Lord Phillimore.

brought in a representative capacity and on behalf of all reversioners, and that, on the death of a presumptive reversioner, the next presumable reversioner would be entitled to continue a suit which his predecessor had begun.

If a suit for possession involving the invalidity of an adoption were to be treated as coming under Article 118, the first reversioner might have known, and the second might not have known, of the adoption six years before ; Or *vice versa*. And the suit for possession might succeed or fail, and the defendant might be ousted of his property or keep it if the first reversioner died before he brought his suit to a hearing.

Moreover, it seems not to have been noticed by the Judges of the Bombay High Court who decided the case in 37 Bombay, that one of the cases cited in *Muhammad Umarkhan* v. *Muhammad Naiz-ud-din Khan* (6) was *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (10). And this case seems to indicate the true canon of construction. Article 91 provides a period of limitation for a suit "to cancel or set aside" certain instruments, the period from which the time begins to run, dating again from the plaintiff's knowledge. The case in *Bijoy Gopal Mukerji* v. *Srimati Krishna Mahishi Debi* (10) was a suit for a declaration that a particular form of lease, made by a Hindu widow, had become inoperative against the reversioners, and for possession of the property. The suit was brought more than three years after the plaintiffs knew of the making of the lease ; and the High Court of Calcutta thought that the time limit applied. The Chief Justice put it that, according to the authorities, if the plaintiffs could recover possession without setting aside the lease, then Article 141 would apply ; but if they had first to set aside the lease, then Article 91. Their Lordships agreed so far, and agreed further that the particular lease was voidable only and not void. But they held that the reversioner might treat it as a nullity, and showed his election to do so by bringing an action for possession, and that he had 12 years for so doing ; and in that case the plaintiff had not, as in the present case, amended his plaint by striking out the claim for a declaration.

The present case seems *a fortiori*. The adoption of the first defendant was void, and the plaintiff is entitled to brush it aside and sue for the possession to which he has a right. His

6. (1911) L R 39 :I. A. 19 22 M L J 240. 10 (1906) 34 I A 87.

P. C.
Desai
v.
Desai
Lord
Phillimore.

time limit is 12 years from the death of the Hindu widow, and he was in time.

A further point was taken for the appellant against the judgment of the High Court which seemed to assume that one adopted son could claim to be the brother and heir of another adopted son. But it is not necessary for their Lordships to pronounce upon this contention, which might otherwise have had to be seriously considered.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, and that the decree of the High Court should be reversed and the decree of the Subordinate Judge restored, and that the appellants should have their costs here and below.

Solicitor for appellant *E. Dalgado.*

Solicitor for respondent *T L. Wilson and Co.*

A. D. M. *Appeal allowed.*

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Raghunath Prasad *Appellant.*

v.

Sarju Prasad and others *Respondents.*

(On appeal from the High Court at Patna.)

P. C.
Raghunath
Prasad
v.
Sarju
Prasad

Contract Act (as amended), S. 16—Construction—Legislation of other countries—English Money-lenders Act and cases decided thereunder—Reference to—Permissibility—S. 16, Sub-S. (3)—Undue influence—Rectification of contract on ground of Onus of proof—Unconscionable bargain—No proof of position to dominate will—Effect—Mortgage—Execution under undue influence—Presumption of—Security ample—Excessive and usurious interest—Provision for—Effect—Suit upon mortgage—Interest at contract rate—Till what date allowed.

The suit was for recovery of the amount of principal and interest due by the appellant to the respondents (the plaintiffs) under a mortgage deed which provided that interest on the principal sum should be paid at 2 per cent. per mensem on the 30th Jeth of each year, and that, in case of non-payment of the annual interest, the interest should be taken as principal and interest should run thereon at 2 per cent. per mensem, that is, interest should be calculated on the principle of compound interest. The suit was instituted eleven years after the date of the mortgage, and in that period the stipulation for interest at 24 per cent. compound had magnified the sum covered by the mortgage more than

P.C.

Raghunath Prasad v. Sarju Prasad

eleven-fold. The question was whether the appellant fell within the protective provisions of S. 2 of the Contract (Amendment) Act, 1899.

At the time of the execution of the mortgage, the appellant was a member of a joint Hindu family consisting of himself and of his father and owning property of considerable value ; he was *sui juris*, he had the full power of bargaining and binding his estate ; his estate was not under the Court of Wards ; and he lay under no disability. With regard to his helplessness nothing whatever was proved in the case except the bare fact that he, being a man of wealth as owner of one-half of certain joint family property, wished to obtain and did obtain certain monies. The only relation between the parties that was proved was simply that they were lender and borrower. There was not even an attempt at proving that the lender was in a position to dominate the will of the borrower.

Held that, even though the bargain had been unconscionable, the remedy under the Indian Contract Act (of rectifying the bargain) did not come into view until the initial fact of a position to dominate the will had been established.

In decreeing the suit their Lordships allowed compound interest on the principal at 2 per cent. per mensem from the date of the execution of the bond until the date of the decree of the Court of First Instance and, thereafter simple interest at 6 per cent. per annum up to the date of realization.

Three matters are dealt with by S. 16, Sub-S. 3 of the Contract Act, as amended. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated, the second stage has been reached—namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the *onus probandi*. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other. Error is almost sure to rise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of the parties.

The fact that a mortgage for ample security provides for excessive usurious interest does not in itself raise a presumption of undue influence until the question has first been settled as to the lender being in a position to dominate the borrower's will.

The question whether a contract has been induced by undue influence must be decided with referenc to S. 16 of the Contract Act as amended, and not by reference to the legislation of other countries, *e. g.*, the English Money-lenders Act or to cases decided under that Act. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English Statute, and form a guide to its interpretation.

Appeal (No. 117 of 1922) from a Judgment and Decree (November 9, 1920), varying a decree (September 25, 1917) of the Subordinate Judge at Arrah.

De Gruyther, K. C., H. N. Sen and *Abdul Majid* for the appellant.

Dunne, K. C. and *S. Hyam* for respondents.

P. C.

Raghunath Prasad v. Sarju Prasad

Lord. Shaw

December 18, 1923. The Judgment of their Lordships was delivered by

LORD SHAW :—This is an appeal from a decree, dated November 9, 1920, of the High Court of Judicature at Patna, which varied a decree, dated September 25, 1917, of the Subordinate Judge of Arrah.

The suit is for recovery of the amount of principal and interest due by the appellant to the respondents (the plaintiffs) under a mortgage of date May 27, 1910. The Subordinate Judge gave decree in the mortgage suit, but only allowed simple interest. The High Court allowed compound interest.

The substantial question raised on the appeal is whether the appellant, in the circumstances proved in the case, fell within the protective provisions of S. 2 of the Indian Contract (Amendment) Act, 1899.

It may be convenient to set out that section in full " 2. Section 16 of the Indian Contract Act, 1872, is hereby repealed, and the following is substituted therefor, namely :—

" 16. (1) A Contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

" (2) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—

" (*a*) where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other or

(*b*) where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

" (3) Where a person who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

" Nothing in this sub-section shall affect the provisions of S. 111 of the Indian Evidence Act, 1872. "

It is in the view of the Board by that section that the question arising between these parties falls to be settled, and not by

reference to the legislation of other countries, *e. g.*, the English Money-lenders' Act. The statute to be here construed is the Indian Contract Act as amended. It is accompanied with danger to invoke as authority in an Indian case expressions which merely connote the principles which underlie a particular English statute, and form a guide to its interpretation. As will be seen, this general observation is required by reason of the citation of certain authorities alluded to in the judgment of the Subordinate Judge and referred to in the argument before their Lordships' Board.

The appellant is a member of a joint undivided family owning a property of considerable value, including (*inter alia*) 186 villages, assessed to revenue for about Rs. 17,000 per annum.

The mortgage is dated May 27, 1910. It is for the sum of Rs. 9,999 borrowed from the plaintiffs. The rate of interest is covered by the following provision "I, the declarant, do promise that I shall pay interest on the said debt at the rate of 2 per cent. per mensem on the 30th Jeth of each year. In case of non-payment of the annual interest, the interest will be taken as principal and interest will run at the rate of 2 per cent. per mensem, that is, interest will be calculated on the principle of compound interest."

There can be no question that these terms were high if payment was not made the sum due on the mortgage would speedily mount up. By the decree of the High Court which was pronounced on November 9, 1920, it is seen that the original debt of Rs. 10,000 had reached, with interest and costs calculated up to May 8, 1921, more than a lac of rupees— namely, Rs. 1,12,885. In eleven years the stipulation for interest at 24 per cent. compound had magnified the sum covered by the mortgage more than eleven-fold. It is upon these facts, coupled with one other about to be mentioned, that the appellant takes his stand.

The statement in the defence admits that at the time of the execution of the mortgage the defendant was owner of one half of a valuable joint family property. The owner of the other half was his father. Father and son had quarrelled. Serious allegations are made by the son against the father; whereas it appears that the father had instituted criminal proceedings against the son. Shortly before the date of the mortgage the defendant had borrowed Rs. 1,000 from the plaintiffs,

P. C.

Raghunath Prasad v. Sarju Prasad

Lord Shaw

so as to enable him to defend himself in these criminal proceedings. It is alleged that they caused him great mental distress, and that he required more money to conduct his litigations. That is the story.

Evidence was taken in the case. It is sufficient to say that the defendant gave no evidence at all. It is quite plain that no Court can accept a story thus unproved by its author as establishing a case either of mental distress or of undue influence under the Indian Contract Act. The only case which the appellant has is the case derived from the contents of the mortgage itself.

It is argued with force that these are unconscionable, and that it is the duty of the Court in India to step in either to rescind the contract or to rectify the bargain. It was the latter course which was argued for in the present case. In support of this argument much reliance was placed upon the judgment delivered by Lord Davey in *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1).

Before, however, addressing themselves to the authorities cited their Lordships think it desirable to make clear their views upon, in particular, S. 16, Sub-S. 3, of the Contract Act as amended. By that section three matters are dealt with. In the first place the relations between the parties to each other must be such that one is in a position to dominate the will of the other. Once that position is substantiated the second stage has been reached—namely, the issue whether the contract has been induced by undue influence. Upon the determination of this issue a third point emerges, which is that of the onus probandi. If the transaction appears to be unconscionable, then the burden of proving that the contract was not induced by undue influence is to lie upon the person who was in a position to dominate the will of the other.

Error is almost sure to arise if the order of these propositions be changed. The unconscionableness of the bargain is not the first thing to be considered. The first thing to be considered is the relations of these parties. Were they such as to put one in a position to dominate the will of the other? Having this distinction and order in view the authorities appear to their Lordships to be easily properly interpreted. In the judgment of this Board in *Dhanipal Das* v. *Maneshar Baksh Singh* (1) the outstanding effect was that the borrower who mortgaged the estate was actually, at the date of the

1. (1906) L R 33 I A 118.

P.C.

Raghunath Prasad v. Sarju Prasad

Lord Shaw

transaction, under the control of the Court of Wards. He was treated, to use the language of Lord Davey, as " under a peculiar disability " and placed in a position of helplessness, and the lender was proved to have been aware of that and, therefore, in a position to dominate the borrower's will. Lord Davey thus expressed the Board's view at p. 126: "Their Lordships are of opinion that although the respondent was left free to contract debt, yet he was under a peculiar disability and placed in a position of helplessness by the fact of his estate being under the control of the Court of Wards, and they must assume that Auseri Lal, who had known the respondent for some fifty years, was aware of it. They are therefore of opinion that the position of the parties was such that Auseri Lal was ' in a position to dominate the will ' of the respondent within the meaning of the amended S. 16 of the Indian Contract Act. It remains to be seen whether Auseri Lal used that position to obtain an unfair advantage over the respondent."

This case was followed in terms in *Maneshar Bakhsh Singh* v. *Shadi Lal* (2) in which the bond in suit was given by a talukdar in Oudh without the knowledge and consent of the Court of Wards after his estate had been placed under it. In these circumstances the former case was followed, and Lord Collins expressed the opinion of the Board to be that they " are satisfied that in this case also the borrower was placed in such a condition of helplessness that the lender was in a position to dominate his will and that he used that position to obtain an unfair advantage over the appellant."

It is sufficient to say that the borrower in the present case was *sui juris* ; had the full power of bargaining and of burdening his estate, that his estate was not under the Court of Wards, and that he lay under no disability. With regard to his helplessness nothing whatsoever is proved in the case except the bare fact that he, being a man of wealth as owner of one-half of certain joint family property, wished to obtain and did obtain certain moneys on loan. The only relation between the parties that was proved was simply that they were lender and borrower.

It is an entire mistake to represent the decisions of this Board as being wanting in light upon the case last but one

2. (1909) L R 36 I A 96 19 M L J 438.

P. C.

Raghunath Prasad v. Sarju Prasad

Lord Shaw.

mentioned. For in *Sundar Koer* v. *Sham Krishen* (3) the exact point was referred to by Lord Davey in the course of the judgment read by him " There is no evidence of any actual exercise of undue influence by the mortgagees or of any special circumstances from which an inference of undue influence could be legitimately drawn, except that the mortgagor was in urgent need of money. The learned counsel for the appellant argued that the mortgagees were thereby placed in a position 'to dominate the will' of the mortgagor, and cited a recent decision of this Board : *Dhanipal Das* v. *Maneshar Bakhsh Singh* (1). In that case, however, the borrower was 'a disqualified proprietor' under the Oudh Land Revenue Act, 1876, and his estate was under the management of the Court of Wards, and it was on that ground that their Lordships held that the borrower was under a peculiar disability and the position of the parties was such that the lender was 'in a position to dominate his will.' There is nothing of that kind in the present case, and their Lordships are not prepared to hold that urgent need of money on the part of the borrower will of itself place the parties in that position."

This precisely fits the situation of these parties. It has not been proved—it might be said that it has not even been attempted to be proved—that the lender was in a position to dominate the will of the borrower.

In these circumstances, even though the bargain had been unconscionable (and it has the appearance of being so), a remedy under the Indian Contract Act does not come into view until the initial fact of a position to dominate the will has been established. Once that fact is established, then the unconscionable nature of the bargain and the burden of proof on the issue of undue influence come into operation. In the present case, for the reasons stated, these stages are not reached.

Their Lordships think it right to observe that the judgment now pronounced is not in accord with the principles laid down by the Appellate Civil Court of Calcutta in *Abdul Majeed* v. *Khirode Chandra Pal* (4), that " where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate." Their Lordships think that decision to be wrong. There is no such presumption until the

3. (1906) L R 34 I A 9, 16. 1. (1906) L R 33 I A 118.
4. (1915) I L R 42 C 690.

P. C.

Raghunath Prasad v. Sarju Prasad

Lord Shaw

question has first been settled as to the lender being in a position to dominate the borrower's will. Their Lordships are further of opinion with reference to the citation of *Samuel* v. *Newbold* (5) that that case does not form any authority in the construction of the Indian Contract Act. The case was determined under the Moneylenders Act, 1900, as it expressly bears. The issue was thus stated by Lord Macnaghten "It seems to me that the construction of the Moneylender's Act, 1900, is plain enough, and that the evidence before their Lordships is more than sufficient to show that this case is within the mischief which the Act was designed to remedy."

In the view of the Board cases of that character form no precedent for a decision of the present appeal, which is rested on another and very differently worded statute.

Their Lordships are of opinion that the decree of the High Court should be varied by allowing compound interest on the principal at the rate of 2 per cent. per mensem from the date of the execution of the bond until September 25, 1917, and thereafter simple interest at the rate of 6 per cent. per annum up to the date of realization, and that in other respects the decree of the High Court should be affirmed, and they will humbly advise His Majesty accordingly.

The appellants will pay the costs of the appeal.

Solicitors for appellant : *Chapman-Walker* and *Sheppard.*

Solicitors for respondents *Barrow, Rogers* and *Nevill.*

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5. (1906) A C 461.

PRIVY COUNCIL.

PRESENT:—LORD SHAW, LORD CARSON, SIR JOHN EDGE, MR. AMEER ALI AND SIR LAWRENCE JENKINS.

Ma Thaung and another — *Appellants*

v.

Ma Than and others — *Respondents.*

On Appeal from the Court of the Judicial Commissioner, Upper Burma.

P. C.

Ma Thaung
v.
Ma Than

Burmese Buddhistic Law—Inheritance—Children by first wife—Claim to share in inheritance of father as against their step-mother—Partition between children and father allotting specific shares to father—Effect—Contract—Construction—Conduct of parties—Evidence of—Admissibility—Burmese Buddhistic Law—Wife—Position of—Arrangement between father and children by first wife—Partnership or partition arrangement—Deed—Construction.

Held, the children by a first wife of a Burmese subject to the Burmese Buddhistic Law will not be entitled to claim from their step-mother a share in the inheritance of their father after a partition in his lifetime allotting them specific shares in the property he possessed.

The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings.

In the Burmese social and legal system the wife is, to all intents and purposes, a partner.

N, a Burmese subject to the Burmese Buddhistic Law and a trader by profession, carried on a business in rice in conjunction with his first wife. She died leaving five sons and two daughters, who were all *sui juris* when she died. No division took place between N and his children by his first wife, and they continued, as in the lifetime of the first wife, working in common. On the eve of N marrying again, he, with the agreement and consent of his sons and daughters, entered into a written arrangement by which he allotted to five of his children a six-eighth of his property, and to the two younger ones one-eighth between them, retaining for himself an eighth share.

Held, on a construction of the written arrangement and on a consideration of the conduct or the parties to it, that the arrangement was a deed of partition of the property possessed by N at the time and not merely a partnership agreement.

Appeal (No. 10 of 1923) from a decree (October 25, 1921) of the Court of the Judicial Commissioner, reversing a decree (March 31, 1920) of the District Judge of Mandalay.

Sir George Lowndes, K. C., Parikh and *M. Sanwa* for the appellants.

Dunne, K. C. and *Kenworthy Brown* for the respondent No. 1.

P C.

Ma Thaung
v.
Ma Than

Mr. Ameer Ali

Dec. 18. The Judgment of their Lordships was delivered by

MR. AMEER ALI: This appeal arises out of a suit brought by the plaintiffs in the Court of the District Judge of Mandalay, Upper Burma, for a share in the inheritance of one U Nyein, a Burmese subject to the Burmese Buddhistic Law. It was treated in the first Court as a suit for administration, and a decree was made therein by the District Judge on June 1, 1920. This decree was reversed on October 25, 1921, by the Judicial Commissioner of Upper Burma, and the plaintiffs' claim was dismissed ; hence this appeal to His Majesty in Council.

The facts of the litigation are set out with clearness and precision in the able judgment of Mr. Mosley the District Judge.

U Nyein was a trader by profession, and appears to have carried on in conjunction with his wife, Ma Gale, a profitable business in rice. They had a rice-mill which, it is stated, was opened in 1894 and appears to have been at the time of Ma Gale's death in December, 1904, a valuable property. It is to be noted that in the Burmese social and legal system the wife is, to all intents and purposes, a partner.

U Nyein had by Ma Gale five sons and two daughters, who were all *sui juris* when she died. Although under the Burmese law the eldest daughter became entitled on Ma Gale's death to a definite share in her property, no division took place, and the father and the children continued, as in her lifetime, working in common.

Some months after Ma Gale's death, U Nyein appears to have contemplated marrying again. Before, however, the marriage was actually contracted, on May 11, 1905, he executed the document exhibit L, on the construction and meaning of which the determination of this appeal turns. About a fortnight later U Nyein married Ma Than, the contesting respondent in this appeal.

Exhibit L, is in the form a partnership deed, but the respondent contends that in fact it is a partition deed by which U Nyein divided his property amongst his children.

It is urged on her behalf that, under the law of the *Dhammathats*, the children have, after the partition, no right in the property retained by the father. The plaintiffs deny the

P. C.

Ma Thaung
v.
Ma Than

Mr. Ameer Ali

correctness of the legal proposition on which the respondent bases her contention, and they urge that, whatever the meaning of exhibit L, they are entitled to a share in their father's inheritance.

A number of issues were framed in the Court of the District Judge ; the two following embody the substance of the matter now in dispute (*i*) was the deed of arrangement dated May 11, 1905 (exhibit L), between U Nyein and his children a division of inheritance in view of his approaching marriage with Ma Than, or was it a mere agreement of partnership ? (*ii*) Are his children who signed that agreement entitled as heirs to share in the property retained by U Nyein under that agreement ?

The District Judge, on the form of the document, coupled with the evidence to which he refers in his judgment, came to the conclusion that exhibit L, was not a deed of partition but merely a partnership agreement, and he accordingly, as stated already, made an adminitsration decree with respect to the inheritance of U Nyein.

On appeal the Judicial Commissioner has taken a different view. From the circumstances proved in the case he infers that, contemporaneously with exhibit L, there must have been between U Nyein and his children some agreement, necessarily parol, which led him to put the division in the shape it has taken. In one place he says as follows It is open to the parties to prove that it was a condition precedent to the attaching of any obligation under the contract, that the disposition should be regarded as a partition of property in view of the marriage, and that the claims of the children of U Nyein as his heirs on his death should be modified accordingly. Further Ma Than was not a party to the document, nor can she I think for this purpose be regarded as the representative in interest of such a party. She is therefore entitled under the provisions of S. 99 of the Evidence Act to show a contemporaneous agreement. It does not seem to me however that Ma Than is trying to show such a contemporaneous agreement. She does not deny that the terms of agreement between the parties were those of a partnership. Her contention is that that agreement formed a part of a larger transaction and that it was made for the purpose of effecting a division of property. I am of opinion that it is open to her to

P. C.
Ma Thaung
v.
Ma Than
Mr. Ameer Ali

prove her contention by oral evidence. At the time that the deed was drawn up Ma Than was a stranger to the family. It is not surprising therefore that she is unable to bring any direct evidence as to the intention of the parties when the deed was drawn up, and as to the effect of the deed." He is, however, definite in his conclusion that the deed in question was drawn up in view of the approaching marriage, and that by this instrument U Nyein did effect a partition of his property with his children by Ma Gale.

Owing to this divergence of opinion between the two Courts in Burma, their Lordships have carefully examined the terms of the document (exhibit L). In their opinion it speaks for itself.

It begins with the usual formula "On May 11, 1905, corresponding to the 9th Waxing of the month of Kason 1267 (Burmese Era), at Mandalay, U Nyein and his sons and daughters, in order to carry on business, execute this agreement as follows : U Nyein will transfer all the properties, which have been in his name up to this date, to the name of the partnership. All the house sites, buildings, rice, paddy, ponies, gharries, gold and money, which have been in existence up to this date, will belong to the partnership. The sums of money, which Maung On Shwe, Maung San Hnyin and Maung Aung Min have taken before this date, will be considered as the money belonging to the partnership. The mill and all machines connected with it, which have been already taken possession of, belong to the partnership. Without the consent of the majority (but not one) of the partners, the husband, wife, or co-heirs of a partner cannot make use of the properties belonging to the partnership. The shares, to which the partners have the right to ownership in all the partnership properties are shown below. Either partner Ma E Yin or partner Ma Thaung will take charge of all the private properties belonging to partnership, such as jewellery, etc. The partnership is responsible for all the debts which have been owed to, or owed by, other people up to this date. The partnership will carry on business in accordance with the wish of the majority of the partners."

It then gives the shares as follows :—

1. U Nyein has the right of ownership to one-eighth share.

P. C.
Ma Thaung
v.
Ma Than
Mr. Ameer Ali

2. Maung On Shwe 3. Ma E Yin 4. Maung San Hnyin 5. Maung Aung Min 6. Ma Thaung	}	The five persons have the right of ownership to six-eighth share.
7. Maung Po Thaung 8. Maung Po Ka.	}	These two persons have the right of ownership to one-eight share.

The deed was duly signed by all the executants.

The strange similarity of language between the terms of the provision contained in the second paragraph of exhibit L, and the rules laid down in the *Dhammathats* for division of family property on the demise of one of the parents is striking. The paragraph in question provides that " all the house sites, buildings, rice, paddy, ponies, gharries, gold and money which have been in existence up to this date will belong to the partnership." In any ordinary partnership the inclusion of these articles would be regarded as unusual ; but bearing in mind the rules of the *Dhammathats* it would be natural, and in the ordinary course, in a deed of partition. Again, the paragraph relating to jewellery appears to be unusual in a deed of partnership designed for carrying on business. The provision is as follows " Either partner Ma E Yin or partner Ma Thaung" (two of the daughters) " will take charge of all the private properties belonging to the partnership such as jewellery, etc."

These particular provisions appear in their Lordships' opinion to furnish the key to the solution of the question whether Ex. L is a deed of partnership or a deed of partition. U Nyein was about to contract a second marriage. Under the Burmese Law whatever he possessed at the time of contracting the relationship which he contemplated would become on the marriage the common property of his wife and himself. Nothing was more natural than that, influenced by the effect of such an eventuality on the position of his children by Ma Gale, he should, in order to provide for them during his lifetime, whilst he was absolute owner of the properties he possessed, decide upon a partition which would secure a definite share in his or her own right to each child. He accordingly, with the agreement and consent of his sons and daughters, entered into the arrangement embodied in Ex. L. None of them was entitled to any share in his lifetime. By this deed he allotted to five of his children a six-eighth of his property, and to the two younger ones one-eighth between them, retaining for him-

self an eighth share. The conduct of the parties to a contract reduced into writing may not vary or alter it, but their conduct may help to explain or elucidate a contract open to different meanings. The mode, therefore, in which the sons and daughters of U Nyein dealt with their shares is material it helps to strengthen the conclusion that Ex. L was more a record of a division of rights and interest than a deed of partnership.

There were not only independent dealings between one or other of the children, but also between them on one side and Ma Than and U Nyein on the other. In 1907, in a suit brought by the minor son of U Nyein's third son against U Nyein and his other children, the rights of the parties came into debate. In his written statement U Nyein distinctly states that the business of rice-miller was started by him on his own account with his own capital, and that "by way of providing for his children he gave them the shares in the business mentioned in the partnership deed." U Nyein's statement was confirmed by the other defendants in a joint defence filed by them. The attempt to make out they had made that admission under the instigation of U Nyein signally failed in the first Court.

After her marriage with U Nyein, Ma Than appears from the evidence to have assisted him in his business, and although there was no definite separation between U Nyein and his children by Ma Gale, the new menage was carried on quite independently and separately from them.

On the whole, their Lordships have come to the conclusion that Ex. L evidences a partition of the rice-mill business and other property U Nyein possessed at the time. That being so, the question arises whether the provision of law the respondent invokes in her favour excludes Ma Gale's children from sharing in the inheritance of U Nyein. It has to be noticed that U Nyein died nine years after his marriage with Ma Than, and within this period U Nyein and Ma Than appear to have accumulated considerable property. The present claim therefore cannot be regarded as unreasonable or unnatural.

The passage on which the respondent relies is contained in S. 213 of Mr. U Gaung's Digest of the Burmese Buddhist Law, Vol. I, page 276. The heading of the section runs thus "After partition between children and surviving parent, the latter marries again and dies; the children are not entitled to claim inheritance from the step-father or step-mother."

P. C.

Ma Thaung v. Ma Than

Mr Ameer Ali

The rule which follows is in these terms "After the death of the husband, the wife partitions the property with her children and marries again taking her share with her. On her death the children of her former marriage cannot claim from their step-father any property which she took to the second marriage ; because they have already obtained their shares. The same rule applies when, after the death of the wife, the husband marries again after having given the children their respective shares." It is stated in the Digest to be extracted from Dhammathat Klaw.

It is contended on behalf of Ma Than that under the latter clause the plaintiffs, having received from U Nyein their respective shares, cannot claim any further share in his inheritance. On the side of the plaintiffs it is urged that this latter rule does not occur in any of the other Dhammathats and ought not therefore to have effect given to it.

Admittedly this is the only passage which expressly declares that the children will not be entitled to share in the inheritance of their father after a partition in his lifetime allotting them specific shares in the property he possessed.

The Burmese Dhammathats are numerous, and the criterion for arriving at a definite conclusion with regard to a particular rule is indicated in the Judgment of the Board in the case of *Mah Nhin Bwin* v. *U Shwe Gone* (1).

Their Lordships, however, do not think it necessary in the present case to go through all the Dhammathats for the purpose of discovering what the other Dhammathats declare.

Nothing has been shown to militate against the authenticity or the binding character of the rule on which the respondent relies ; and in the present state of the authorities, their Lordships are not prepared to dissent from the view expressed by the Judicial Commissioner. They are, accordingly, of opinion that this appeal fails and should be dismissed.

Their Lordships will humbly advise His Majesty to this effect. There will be no order as to costs.

Solicitor for appellants : *E. Dalgado.*

Solicitors for first respondent *Lowe and Co.*

Appeal dismissed.

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1. (1914) L R 41 I A 121 : 27 M L J 41.

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH AND LORD SALVESEN.

Judawan Prasad ... *Appellant*

v.

Shatruhan Prasad ... *Respondent.*

(On appeal from the Court of the Judicial Commissioner, Central Provinces.)

P. C.
Judawan Prasad
v.
Shatruhan Prasad

Practice —Privy Council —Adoption —Issue of fact—Finding of fact of trial Judge reversed by appellate Court and Privy Council—Practice of Privy Council in deciding questions of fact.

In a suit for recovery of possession of certain ancestral property, the defendant contended that he was the adopted son of the deceased owner. The trial Judge, on the issue of adoption, upon a review of the evidence, found for the plaintiff, but these findings were reversed by the Court of the Judicial Commissioners on appeal.

Held, by the Privy Council that the Court of the Judicial Commissioner was substantially correct in its review of the evidence upon the question of the fact of adoption ; Judgment of that Court accordingly affirmed.

In such questions of fact, their Lordships simply announce the decision of the Board, without discussing in detail the views of the inferior Courts.

Appeal from a decree of the Court of the Judicial Commissioner, Central Provinces, (1st December, 1920), which reversed a decree of the District Judge of Raipur (11th February, 1920).

On the 13th February, 1919, the appellant instituted the present suit (No. 8 of 1919) claiming as the reversionary heir of his late brother Ram Prasad to recover, on the death of his widow, possession of certain lands from the respondent who claimed them as his adopted son. The deceased died in 1892, his widow in 1918.

The questions raised in the appeal were :—

(1) whether Art. 118 of the Second Schedule to the Limitation Act (XV of 1877) applied to the suit, in which case it would be barred ;

(2) whether the adoption was proved.

The District Judge (S. B. Chitnavis Esq.) who tried the action, in his judgment on the 11th February, 1920 had held

P. C.

Judawan Prasad v. Shatruhan Prasad

(following *Velaga Mangamma* v. *Bandlamudi* (1) : *Chintaman* v. *Seth Moahntal* (2), that Art. 118 did not apply to suits for possession ; and this part of his judgment was accepted by the Court of the Judicial Commissioner (Batten and Hallifax, JJ.) on appeal.

On the second issue, of adoption, the respondent had sought to prove this by (*a*) the evidence of six eye-witnesses (*b*) evidence that he performed the funeral rites of the deceased (*c*) the widow's admission of the adoption, and her causing mutation of names about 1895 in respondent's favour, except as to a share in two villages reserved for her maintenance, and by the alleged acquiescence of the appellant and the rest of the family in such mutation. The eye-witnesses were the respondent's natural mother and relations and tenants of the family, who had deposed to a formal giving and taking in adoption in or about the year 1880 before certain tenants called in to assist at a partition of family lands. The District Judge had disbelieved this evidence because of the witnesses' relationship or connection with the family, of discrepancies in the details of their stories, and, in particular, because of certain facts elicited from the respondent's natural mother in cross-examination. These facts were that the respondent was the youngest of twin sons, and that, by her father-in-law's direction, the deceased's wife, who was childless, took him to her house on the day of his birth to sleep (though the witness fed him), and that, shortly afterwards, the deceased and his wife were arrested on a criminal charge, and the child was therefore returned to her keeping till after they were released, after which the formal giving and taking in adoption took place. The trial Judge had considered these facts inconsistent with the formal giving and taking to which the other witnesses had deposed. The Judicial Commissioners, after a review of the evidence in detail, accepted it, considering that the story of the respondent's natural mother explained and fortified the story of the formal adoption. Both Courts had agreed that the respondent had performed the funeral rites of the deceased, but the trial Court had held that this was not conclusive evidence of the adoption. As to the mutation of names, the trial Court had laid stress on the reservation of property for the widow, but the Judicial Commissioners pointed out that such a reservation was customary, and they also considered that the appel-

1. I L R 30 M 308. 2. 3 C P L R 32.

P. C.

Judawan Prasad v. Shatruhan Prasad

lant's conduct, both in acquiescing in the adoption till the widow's death, and in making certain untrue statements, was strong evidence of the adoption. They accordingly had reversed the judgment of the District Judge, and had dismissed the suit.

The plaintiff thereupon appealed to Privy Council.

Kenworthy Brown for the appellant.

Sir George Lowndes K. C. and *Raikes* for respondent.

7th February, 1924. The Judgment of the Board was delivered by

Lord Shaw.

Lord Shaw.—This is an appeal against a decree of the Court of the Judicial Commissioner of the Central Provinces, reversing a decree of the District Judge at Raipur, which had dismissed the suit.

There are two questions in the appeal. One has reference to the adoption of a child who has been for 24 years in possession,, since the alleged date of adoption, of a certain village property. The other point in the appeal is one of limitation.

Their Lordships, however, have come to a certain conclusion on the first of these two points, which renders it unnecessary to deal with the second.

On a question of fact of this kind, their Lordships simply announce the decision of the Board, which is to the effect that they entirely agree in substance with the decree pronounced by the Court of the Judicial Commissioner. That decree, while reversing the decree of the District Judge, contains certain observations with regard to a judicial officer which, in their Lordships' opinion, were, from anything appearing in the record, unnecessary, and which do not add to the strength of the judgment. That judgment, however, thus reversing the decree of the District Judge, is, in their Lordships' opinion, substantially correct as a review of the evidence upon the question of fact. Their Lordships have had nothing before them which, in their view, would justify a reversal of the decree passed in accordance with the judgment; which will accordingly stand, and the costs of the appeal will fall upon the appellant. Their Lordships will humbly advise His Majesty in that sense.

Solicitor for appellant : *Watkins* and *Hunter*.

Solicitor for respondent : *T. L. Wilson and Co.*

A. D. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD DUNEDIN, LORD PHILLIMORE, SIR JOHN EDGE, MR. AMEER ALI AND LAWRENCE JENKINS.

Ramlal Hargopal ... *Appellant.*

v.

Kishanchand and others ... *Respondents.*

(On Appeal from the Court of the Judicial Commissioner Central Provinces.)

P. C.

Ramlal Hargopal *v.* Kishanchand

Civil Procedure Code, S. 20—Award—Application under Sch. II, Para. 20 for filing award—Jurisdiction—Subject-matters of award in different jurisdictions—Application under Sch. II, Para. 20 to file award to which Court can be made—Jurisdiction—Objection to—Privy Council Appeal—Maintainability for first time at hearing of—Costs of Privy Council Appeal and of Courts below—Disallowance of, to successful appellant—Grounds—Appeal allowed on ground not raised in Courts below if one of.

The provision in S. 104, Sub-S. (2) of C. P. Code deals with internal appeals within the limits of British India. There is nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109.

Held, that an appeal lay to His Majesty in Council from an order passed in appeal from an order refusing to file an award.

Their Lordships are bound to take notice of an objection to the jurisdiction, however late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction.

P died, having founded two temples within the dominions of the Nizam, and a third in British Inda, not, however, within the District of Berar. Three jagir villages, one within the Nizam's dominions, and two within British India and the District of Berar, were subsequently granted by Government for the support of the worship in these temples. On the death of *P,* disputes having arisen between his descendants, they were referred to the award of their family priest who made his award. On an application by the respondents, parties to the reference, under S. 525 of C. P. Code of 1882, that the award should be filled in Court, the appellant, also a party to the reference, raised the objection at the outset that the District Court of Berar, to which the application was made, had no jurisdiction over the subject-matter of the award, as required by S. 20 of C. P. Code of 1908. The appellant did not, however, insist upon the objection in the Courts below and in his printed case to the Privy Council and only raised it at the hearing of the appeal before their Lordships.

It appeared that there was no substantial question decided by the award which affected property within the jurisdiction of the Berar Court ; that a large part of the award related to family questions and money payments to be made by members of the family, who were all within the Nizam's dominions ; and that though two of the villages which formed the principal endowments of the temples were situated in Berar, there was no dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the temples.

P. C.

Ramlal Hargopal v. Kishanchand

Held, (1) that the objection to the jurisdiction was good and must, in the circumstances of the case, be sustained, though raised at a very late stage ; and (2) that though the decrees of the Courts below were liable to be reversed on the ground of that objection, there should in the circumstances of the case, be no costs either of the Appeal to the Privy Council, or in the Courts below.

It was contended that if an award relates to more than one subject-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court, in fact, that it can be filed in no Court, because no Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their judgment on any such general proposition.

Appeal (No. 9 of 1921) from a decree dated January 13, 1919 of the Court of the Judicial Commissioner of the Central Provinces (Berar Jurisdiction) reversing a decree (December 22, 1917) of the second Additional District Judge of Amraoti.

De Gruyther K. C. and *Dube* for appellant.

Sir George Lowndes K C and *Parikh* for respondents 1-3.

Dec. 10. The judgment of their Lordship was delivered by

Lord Phillimore

Lord Phillimore.—One Mahanandram Puranmal, many years ago, opened a shop in Hyderabad in the dominions of the Nizam and carried on a considerable business, which has been continued to this day by his descendants under his name as the name of the firm. He also founded two temples within the dominions of the Nizam, and a third in British India, not however —and this is important—within the District of Berar. Three jagir villages, one within the Naizam's dominions and two within British India and the District of Berar, were subsequently granted by Government for the support of the worship in these temples.

Puranmal was succeeded by his son Premsukh, who had three sons, Ramgopal, Hargopal and Chimanram. The family, however, has remained undivided, and the business and landed property have remained in common.

Hargopal seems to have died before his father Premsukh; and on the death of the latter, Hargopal's son, Ram Lal, the present appellant, took up the management of the temples, the three villages granted for their support and the family property and business, and his name was entered in the various registers accordingly.

P. C.

Ramlal Hargopal v Kishanchand

Lord Phillimore

In 1907 the representatives of the other two families brought a suit against Ram Lal claiming that they might be declared co-trustees of one of the temples and entitled to exercise control of the income and expenditure of the two jagir villages in Berar. The District Judge of East Berar, in whose Court the suit was brought, dismissed it, holding that he had no jurisdiction to try it. An appeal was threatened, and then the parties came together and agreed to refer all their disputes to the award of their family priest. He heard the parties, and finally on April, 22, 1907, made his award, which was countersigned by all the parties to the dispute. It is a long document, comprising fifty-seven paragraphs, some narrative, some dispositive. He classified the disputes under four heads (1) Relating to the management of the three jagir villages. (2) To the management of the three religious institutions. (3) The estate or family property descended from the ancestor Puranmal. (4) " Monthly allowances and other miscellaneous matters." This last head included questions relating to a field bought by the son of Ram Lal, payment of arrears of allowances, and sums to be given for the expenses of marriages and funerals.

The general tenour of the award was the recognition of the equal rights of the three families and the institution of committees of three, comprising a representative of each family, giving in each case precedence to some one named member, making Ram Lal the principal or managing member of the committee for the jagir villages, and a representative of one of the other branches, managing member of the committee for the religious institutions and provisions of a similar nature with regard to the family property : the effect being to establish the rights of all the branches with certain advantages of precedence and priority given to Ram Lal.

Notiwthstanding that Ram Lal had submitted all matters in dispute to the arbitrator and had signed the award in apparent consent to its provisions, he refused to carry it out, and thereupon the application, which is the subject of this appeal, was made in the Court of the District Judge of East Berar.

It was an application on behalf of the respondents under S. 525 of the Code of Civil Procedure, 1882, that the award should be filed in Court, and it was resisted by the present appellant on a great number of grounds. Upon this there followed a litigation which, by reason both of its complexity and its

P. C.

Ramlal Hargopal v. Kishanchand

Lord Phillimore

length, is open to very serious criticism, as it carefully avoided a question which lay *in limine*, and which if decided, as it ought to have been, would have saved all further proceedings. In a matter which ought to be of a short and summary nature, no less than seven separate orders or decrees have been made and judgments have been delivered and read to their Lordships.

The application for an award having under the section to be treated as a suit, pleadings were delivered by both parties and issues were raised. Some of the objections to the finding of the award have been finally disposed of, a remarkable one being the contention that the family priest was not the real arbitrator, but a name put in as a cloak for benami for that of a judge of a Hyderabad Court, and that the judge did not actually take part, as according to the real agreement of the parties it was intended that he should.

The other serious issues were that as the matter concerned a public charity, there could be no reference to arbitration, that the District Court of Berar had not jurisdiction over the matter to which the award related and was therefore the wrong Court to which to make application under S. 525 ; that the previous decision of the District Court of Berar had already determined these two points in favour of the present appellant, and thus had made each of them *res judicata* as between the parties; that the previous consent of the Commissioner of Berar was necessary, and lastly, that the arbitrator had exceeded his powers by having made orders for which he had no warranty given to him by the submission to arbitration.

The District Judge in his first Judgment, delivered on May 31, 1910, confined himself to deciding certain issues, of which the material ones were No. 2, the question of jurisdiction ; and No. 15, the question of the necessity of the sanction of the Commissioner before the suit, as being a suit relating to a charity, could be maintained. On issue No. 2 he decided that he had jurisdiction, and as regards issue No. 15, he said that the point had not been up to that date properly raised.

The matter then came before another District Judge to determine whether, as contended, there could be no award, as the property constituted a public charitable trust, and as an additional point whether this question had not already been determined adversely to the applicant by the decision in the previous suit and, therefore, must be deemed *res judicata*. Some other issues also came before the Judge, but the only one he

P. C.
Ramlal Hargopal v. Kishanchand
Lord Phillimore

deemed it necessary to decide was that concerning *res judicata*. This point he decided adversely to the applicant, and therefore he dismissed the suit. His decree is dated April 30, 1913.

There was then an appeal to the Court of the Judicial Commissioner of the Central Provinces. The learned Judges said that there were many pleas in defence, but that they were at present only concerned with the reasons which led the Judge of the Court below to dismiss the suit. They even declined to determine whether the trust was or was not a public charitable trust, saying that the only thing they were going to decide was whether the District Judge was right in holding the question to be *res judicata*. They held that he was wrong and remanded the suit to the District Court. This was on June 30, 1915.

When the case next came on, before another District Judge, he addressed himself to the question of the jurisdiction of the Court, and as on the previous occasion, as to whether this point had been already decided in the former suit and had become *res judicata*. These points he decided in favour of the appellant on December 3, 1915.

The next stage of the case seems to have been reached on September 2, 1917, when another District Judge decided that the trust was not one for public puposes, and that in any case the award was not bad as dealing with any public right in respect of such a trust ; but he held that the arbitrator had exceeded his powers and that a subsequent agreement between the parties, or the subsequent action of the arbitrator, had superseded or vitiated the award, and therefore the suit was dismissed again.

From this Judgment there was another appeal, and the Court of the Judicial Commissioner gave its decision on January 13, 1919.

The first point dealt with in this Judgment was the question whether the arbitrator had exceeded his powers. It is here necessary to state that the arbitrator, when dealing with the management of the three religious institutions, did not confine himself to settling the disputes between the three branches of the family, but proceeded to express his opinion that the business of such institutions 'does not go on well as long as they are not placed in the hand of a public committee, and that it seemed to him proper that they should be made over to a public committee after four years' time, namely, in 1911 ; and he accordingly directed that in 1911 a public committee

P. C.

Ramlal Hargopal v. Kishanchand

Lord Phillimore

should be appointed, and that the management of the temple should be entrusted to it, and the moveable and immoveable property made over to it.

As to this direction, the Judges in the appellate Court said that the parties were agreed that this clause, meant to secure the rights of the public, was *ultra vires*, inasmuch as the object of the reference was to settle which members of the family should have the management, and the parties did not intend to surrender their rights to a public body. But they proceeded to hold that these clauses were separable from the rest, and that under the new Code of Civil Procedure of 1908 the Court could separate them and enforce the rest.

As to the point that the award was vitiated or superseded by the action of the arbitrator or the agreement of the parties, they held that in substance the parties had agreed to an amended or additional reference upon which the amended award followed, and that therefore it was not bad.

The Judges next held that a suit to remedy a particular infringement of an individual private right in regard to trust property, did not fall under S. 92 of the Civil Procedure Code of 1908 and therefore did not require the sanction of the Commissioner of Berar before it was begun. They then dealt with some minor points and with the extraordinary objection that the family priest was not the true arbitrator intended by the parties—points, which have not been relied upon before their Lordships. They said that these were all the matters which had been argued before them, and they therefore thought that the award—with the excepion of the portion admitted to be *ultra vires*—should be filed, and they allowed the appeal.

Even then, the matter was not ended, because the parties objecting to the award presented an application for a review of the Judgment, urging first that the award, so far as it was binding, dealt only with the management of the temples up to 1911, and as this year had long since been past, the award was now fruitless ; secondly, that at any rate the award left undetermined the question of management after 1911 and was therefore incomplete ; and thirdly, that the arbitrator had exceeded his powers, because he was only authorized to deal with the management and not with the legal transfer of the property, and he had ordered mutation of names upon the revenue register.

P. C.
Ramlal Hargopal v. Kishanchand
Lord Phillimore

As to these matters, the appellate Court said that their view of the award was that, while intending to provide for a public committee which should have begun in 1911, the arbitrator had also provided for the management of the institutions by divers members of the family until that committee should be appointed, and that if the provision for the appointment of a public committee was *ultra vires,* the management would remain with the family in the manner directed by the award. They also held that the arbitrator had implied authority to direct the mutation of names, and they dismissed the appeal.

In the application for review, which contained also other matters which the Court seems to have passed by as futile—as they probably were—there occurs the following para. 8: "That the pleas of absence of jurisdiction and maintainability of the suit in the absence of the sanction of the Advocate-General should have been decided in favour of the applicant." This paragraph is not noticed in the Judgment upon review which was given on September 3, 1919. As regards the maintainability of the suit in the absence of the sanction of the Advocate-General, whose place for this purpose is taken by the Commissioner of Berar, that matter had been in substance already determined by the High Court in its first Judgment, though it is true that technically the Court only applied itself to the contention that this point was already determined as between the parties and had become *res judicata.*

As to the plea of absence of jurisdiction, it seems very uncertain what the applicants for review intended to convey by this phrase. They may have meant that the Court at Berar was not the Court which had jurisdiction to file the award. They may have meant that there would be no jurisdiction unless the Commissioner for Berar gave his previous sanction. They may have meant that the Court had no jurisdiction, because the award dealt with a public charity. At any rate, their Advocate apparently failed, among the mass of points which he must have presented on review, to bring the question of jurisdiction as such before the Court on this last occasion; and accordingly, there is no pronouncement upon it, and their Lordships are left in this respect without assistance. From this final order the present appeal was brought.

For the respondents, a preliminary objection was taken. It was said that by virtue of the Code of Civil Procedure of 1908 no appeal lay from this particular order or decree to His

Majesty in Council, unless special leave should be given by virtue of His Majesty's general prerogative. Under S. 104 of the Code no appeal is to lie from any order passed in appeal on the question of filing or refusing to file an award, and it was said that the order of the Court of the Judicial Commissioner was an order passed in appeal from the decision of the District Judge refusing to file the award. To this it was replied that under S. 109 an appeal lies to His Majesty in Council from any decree or final order passed on appeal by any Court of final appellate jurisdiction, such as the Court of the Judicial Commissioner.

It was contended for the respondents that if these two clauses were in seeming variance, the particular would supersede the general, and that S. 104 dealt with particular cases.

Their Lordships think that the objection fails. They construe the provision in S. 104, Sub-S. (2), as dealing with internal appeals within the limits of British India. The application to file an award may be made in the Court of the Subordinate Judge. If any dispute arises, and the amount at stake is below a certain figure, the appeal would lie from him to the District Judge. If it were above that figure it would lie to the High Court. The provision is intended to prevent any appeal beyond the District Judge where the sum in dispute is small. In this respect it runs parallel with S. 100, which limits second appeals from appellate decrees by District Judges. That section deals with decrees only while the decisions on these arbitration questions are styled orders. There is therefore nothing in S. 104 to take away the general right of appealing to the Crown given by S. 109 and the preliminary objection taken on behalf of the respondents fails.

The points urged before their Lordships were as follows : (1) The District Judge of Berar had no jurisdiction to deal with the award, this point being subdivided into two branches— absence of local territorial jurisdiction and absence of previous sanction by the Commissioner. (2) As supplementary to (1), that no argument to the contrary could be listened to by their Lordships, because the points had previously been determined between the parties and were *res judicata*. (3) That the management of a public religious trust could not be referred to arbitration. (4) That the arbitrator had exceeded his powers. (5) That the subsequent variations vitiated the award.

P. C.

Ramlal Hargopal v. Kishanchand

Lord Phillimore

It is clear that if the objection that the Court of the District Judge of Berar had no jurisdiction over the subject-matter of the award, as required by S. 20 of Sch. II of the Code of Civil Procedure, 1908, is good, no further points can arise. This point was taken on behalf of the present appellant at the outset, but seems nevertheless never to have been directly insisted upon during the numerous subsequent proceedings. No doubt it was urged that the point must be deemed to have been already decided in favour of the appellant in the previous suit. But their Lordships have not been referred to any place in these lengthy proceedings where they might find an argument in favour of the appellant's contention, if it were to be decided upon as *res integra*. It seems clear to their Lordships that the Judges in the Court of the Judicial Commissioner never imagined that they had to deal with the point, and it is not—except in the indirect and derivative way already mentioned—taken in the printed case lodged on behalf of the appellant before this Board.

If it was any other point except a point of jurisdiction, their Lordships would pay no attention to it; but they are bound to take notice of an objection to the jurisdiction, however late in the day it may be raised, if it be that on the facts admitted or proved it is manifest that there is a defect of jurisdiction; and their Lordships find this defect in the present case. It was contended on behalf of the appellant that if an award relates to more than one subjet-matter and only one is within the jurisdiction of the Court, it cannot be filed in that Court; in fact, that it can be filed in no Court, because no one Court would have jurisdiction over the whole subject-matter. Their Lordships deem it unnecessary to rest their Judgment on any such general proposition. In their view there is no substantial question decided by the award which affects property within the jurisdiction of the Berar Court. No one of the three temples is within that jurisdiction, and two of them are within the dominions of the Nizam and outside British India. A large part of the award relates to family questions and money payments to be made by members of the family and all the members of the family are within the Nizam's dominions. It was urged that two of the villages which form the principal endowments of the temples are situated in Berar. But their Lordships cannot find that there was any dispute concerning the ownership or management of the villages nor any denial that the revenues must be appropriated to the three temples.

P. C.

Ramlal Hargopal v. Kishanchand

Lord Phillimore.

It can hardly be said that there was any dispute as to the application of the revenues, but if there were any, it was a dispute as to their application after they had reached Hyderabad.

It is the duty of the Court in which an award has been filed to proceed to pronounce Judgment according to the award, and upon that a decree is to follow. Their Lordships cannot see that any decree could be framed upon this award which would affect any person or property within the jurisdiction.

The result is that on this ground the appeal succeeds, and the Judgment of the Court of the Judicial Commissioner must be reversed, and the suit must be dismissed ; but inasmuch as this point was never properly insisted upon in the Courts below, or, indeed, in the appellant's printed case here, their Lordships are of opinion that there should be no costs either of this appeal or in the Courts below, and they will humbly advise His Majesty accordingly.

Solicitor for appellant : *H. S. L. Polak.*

Solicitor for respondents Nos. 1, 2 and 3 : *E. Dalgado.*

Appeal allowed.

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, LORD SHAW, LORD WRENBURY, LORD CARSON, AND SIR ROBERT YOUNGER.

Macmillan and Company, Limited ... *Appellants.*

v.

K. and J. Cooper ... *Respondents.*

(On Appeal from the High Court of Bombay.)

P. C.

Macmillan and Company Ltd. v. K. and J. Cooper

Copyright—Compilation consisting of reprint of passages selected from work of author—Notes attached to compilation—Copyright in compilation and in notes—Conditions—Abridgment of author's work—Meaning—Test—Copyright Act of 1911, *S.* 1, *Sub-S.* (1)*—Original literature—Meaning—Test—United States—Decisions of—Not binding on Judicial Committee.*

An abridgment of an author's work means a statement designed to be complete and accurate of the thoughts, opinions and ideas by him expressed therein, but set forth much more concisely in the compressed language of the abridger. A publication the text of which consists of a number of detached passages selected from an author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the

P. C.
Macmillan and Company, Limited v. K. and J. Cooper

appearance as far as possible of a continuous narrative, is not an abridgment at all. The learning, judgment, literary taste and skill requisite to compile properly and effectively an abridgment deserving that name would not be at all needed merely to select such scraps as these taken from an author and to print them in a narrative form.

The conclusion is not correct that a publication the text of which consists merely of a reprint of passages selected from the work of an author can never be entitled to copyright. For instance, it may very well be that in selecting and combining for the use of Schools or Universities passages of a scientific work in which the lines of reasoning are so closely knit and proceeded with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case a copyright might well be acquired for the print of the selected passage.

Copyright is a statutory right.

It is the product of the labour, skill and capital of one man which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour, skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material.

The word "original" in sub-S. 1 to S. 1 of the Copyright Act of 1911 does not mean that work must be the expression of original or inventive thought. Copyright Acts are not concerned with the origin of ideas, but with the expression of thought, and, in the case of "literary work", with the expression of thought in print or writing. The originality which is required relates to the expression of the thought ; but the Act does not require that the expression must be in an original or novel form, but that the work must not be copied from another work—that it should originate from the author.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its compilation in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely upon the special facts of that case, and must in each case be a question of degree.

To be entitled to copyright in the notes added to a compilation, the notes must exhibit an addition to the work which is not superficial or colorable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes.

The appellants claimed to be entitled to the copyright of a certain book entitled "Plutarch's Life of Alexander—Sir Thomas North's Translation, edited for Schools by H. W. M. Parr, M. A." The text of the book consisted of a number of detached passages, selected from Sir Thomas North's Translation, words being in some instances introduced to knit the passages together so that the text should, as far as possible, present the form of an unbroken narrative.

P. C

Macmillan and Company, Limited v. K. and J. Cooper.

The passages so selected were, in the original translation, by no means contiguous. Considerable printed matter in many instances separated the one from the other. Notes being upon the text were appended to the book. It was admitted that if the appellants were entitled to a copyright in their book, or any material part of it, the respondents were guilty of infringement ; and the question for decision in the appeal was whether the appellants were entitled to a copyright in the text of their book and in those notes attached to it.

It was found that it did not require great knowledge, sound judgment literary skill or taste to be brought to bear upon the translation, as the passages of the translation which had been selected were reprinted in their original form, not condensed, expanded, modified or re-shaped to any extent whatever. With respect to the notes, on the other hand, it was found that they were neither trifling in their nature nor useless ; that they made the book more attractive, the study of it more interesting and informing, enhanced its efficiency and consequently increased its value as an educational manual ; and that the notes must have required for the framing of them classical knowledge, literary skill and taste, labour and sound judgment as to what was fitting and useful to be brought to the notice of Schoolboys and Students about to enter the University.

Held, that the appellants were not entitled to a copyright in the text of their book, but were entitled to a copyright in the notes.

Decisions of the Courts in the United States are not binding on the Judical Committee.

Appeal (No. 16 of 1923) from a judgment and decree (October 13, 1921) of the High Court in its Civil Appellate Jurisdiction reversing a decree of the same Court in its Original Civil Jurisdiction.

The Life of Alexander was written by Plutarch in Greek. It was translated into French by Amyot. In 1579 Sir Thomas North translated the French version into English. There existed no copy-right in North's book.

In 1911, the plaintiffs, Macmillan & Co., who were publishers in England and Bombay, brought out an abridgment of North's book, entitled "Plutarch's Life of Alexander, Sir Thomas North's Translation, Edited for Schools by H. W. N. Parr, M. A." The abridgment in question contained passages taken bodily from North's book. Wherever any passage or passages was or were omitted, the thread of the narrative was kept up by introducing what were called transitional notes. The passages retained were given marginal notes to indicate their contents. There was prefixed to the book an introduction ; and notes were appended at the end for educational purposes. In the year 1912, the plaintiffs' book was prescribed as a text-book in English by the University of Bombay for its Matriculation Examination.

P. C.
Macmillan and Company, Limited v. K. and J. Cooper.

The defendants, K. & J. Cooper & Co., who were also publishers of educational works in Bombay, brought out another abridgment of North's book and called it "Plutarch's Life of Alexander (North's Translation abridged), Edited with Introduction, Full Notes, etc., by the Rev. A. Darby." This abridgment also selected passages from North's book; the passages were more numerous than those contained in the plaintiff's book. None of the passages in the plaintiffs' book were omitted. The marginal and transitional notes were left out. The introduction in the beginning was more elaborate and the notes at the end were far more copious. It seemed that in working up those notes a liberal use had been made of the notes contained in the plaintiffs' book.

The plaintiffs sued to restrain the defendants by an injunction from printing and selling their abridgment; for an account of sale of their copies; for delivery of all unsold copies to the plaintiffs; and for damages.

The defendants contended in their written statement that the plaintiffs had no copyright in their abridgment and that theirs was "an independent abridgment and was the result of great skill and labour on their part."

The trial Judge (Fawcett, J.) held that the plaintiffs were entitled to copyright both in the text of their book and in the notes thereto and there had been an infringement as to both. The claim was therefore decreed.

On appeal, the Court of Appeal (Macleod, C. J. and Shah, J.) reversed the decision of the trial Judge and dismissed the suit (*see* 23 Bom. L. R. 1299).

The plaintiffs appealed to the Privy Council.

Sir John Simon, K. C., Mackinnon, K. C., Macgillivray and *A. T. Macmillan* for the appellants.

Upjohn, K. C., E. B. Raikes and *Harold Hardy* for the respondents.

1923. December 14. The Judgment of their Lordships was delivered by

Lord Atkinson

Lord Atkinson.—The action out of which this appeal has arisen was brought by the appellants to restrain the respondents, K. and J. Cooper, a firm carrying on in Bombay the trade and business of publishers of educational books, from printing, distributing or otherwise disposing of copies of a certain book published by them hereinafter described, and to recover

P. C.

Macmillan and Company, Limited v. K. and J Cooper.

Lord Atkinson

damages and other relief. The ground on which this relief was claimed was that the appellants were entitled to the copyright of a certain book entitled "Plutarch's Life of Alexander--Sir Thomas North's Translation—Edited for Schools by H. W. M. Parr, M. A.," and that the respondents by the publication subsequently in the yeaar 1918 of their aforesaid book entitled "Plutarch's Life of Alexander the Great-North's Translation—Edited with Introduction, Marginalia, Notes and Summary by A. Darby, M. A.," had infringed the copyright to which the appellants were entitled in the earlier compilation.

The text of the appellants' book consisted of a number of detached passages, selected from Sir Thomas North's Translation, words being in some instances introduced to knit the passages together so that the text should, as far as possible, present the form of an unbroken narrative. The passages so selected were, in the original translation, by no means contiguous. Considerable printed matter in many instances separated the one from the other. North's Translation consisted of 40,000 words ; the text of the appellants' book contained half of them—i. e., 20,000 words, while the book published by the respondents contained not only the aforesaid 20,000 words but 7,000 words in addition.

In addition to this text comprising the 20,000 words, the appellants' book contained much printed matter which was omitted from the respondents' book namely, marginal notes, an introduction dealing with North's Translation and Alexander's place in history, an analysis of the book's contents, a chronological table setting forth the principal dates in Alexander's life, and a few short notes introduced into the text styled transition notes. The text was divided into six chapters ; notes bearing on the text and a glossary were appended.

On October 14, 1917, notice had by order of the Syndicate of the Bombay University been published prescribing certain text-books in English which were required to be used for the matriculation examination to be held in this University in the year 1919. . The appellants' book was included in that list The title of the appellants' book gives an indication of the purpose for which it was compiled ; but it does not clearly appear from the evidence what was the precise purpose or object of the appellants in limiting the text to 20,000 words and compressing it as they did. It may possibly have been that its

P. C.

Macmillan and Company, Limited v. K. and J. Cooper.

Lord Atkinson.

length was so limited in order that its contents might be mastered in the time available for its study, and it also may have been limited because the appellants desired to exclude everything from it which might be of an indecent or indelicate character, or which it might be thought undesirable for schoolboys to peruse or study. It did not, it would appear to their Lordships, require great knowledge, sound judgment, literary skill or taste to be brought to bear upon the translation to effect any of these objects, as the passages of the translation which had been selected are reprinted in their original form, not condensed expanded, modified or reshaped to any extent whatever.

In or about the month of November, 1917 the respondents published a handbill headed "BombayMatriculation, 1919. Now Ready. Poetical Series, etc." The last book mentioned in the list was the respondent's book entitled as already set forth, with an announcement that it would soon be ready.

The following sentences were then added "In response to (illegible) should bring out reliable annotated editions of English texts prescribed for the Bombay matriculation examination, we have this time published such editions, in the confident hope that they will prove equally useful both to teachers and pupils. These editions will be found more useful than any published in England as having been specially prepared for Indian pupils, by those competent to understand their needs ; and in every respect more reliable than similar editions brought out in this country by editors more or less incompetent for the task they undertake. As all our English Text-books will be ready in the beginning of the next month, teachers will be able to use at least some of them in the Pre-Matriculation Class. K. and J. Cooper, Educational Publishers, Bombay."

The respondents' publication is formed on precisely the same general plan as was that of the appellants'. Its text consisted of a number of detached passages taken from North's Translation joined together, the preceding to the succeeding by a few words where needed so as if possible to give to the whole text the appearance of a consecutive narrative. Notes were also contained in the respondents' book which were in many instances servilely copied from those contained in the book of the appellants.

The learned Judges in the Court of Appeal were of opinion that the respondents intended and designed to publish a

P. C.

Macmillan and Company, Limited v. K. and J. Cooper

Lord Atkinson

book which the student of the University would buy in preference to the book of the appellants, and that Mr. Cooper's evidence to the contrary was obviously false. Their Lordships entirely concur with the learned Judges of the Court of Appeal in the opinion they have formed on this point.

If the appellants were not entitled to a copyright in their book, or any material part of it, then the respondents were entitled to do what they have done. If, on the contrary, the appellants were entitled to a copyright in their book, or any material part of it which the respondents had practically copied, then the respondents were admittedly guilty of infringement. It is obvious therefore, that the primary question to be determined on the appeal is whether the appellants were entitled to a copyright in the text of their book and in those notes attached to it, which latter the respondents had in many instances in effect copied.

During the course of the argument much discussion arose as to the result that would follow if North's Translation of Plutarch's life was a publication which was actually the subject of copyright, or was capable of becoming so. These are interesting and rather difficult questions to solve ; but their Lordships do not feel themselves called upon to attempt to solve them, because on the facts of this case they do not arise. North's Translation of Plutarch's life of Alexander does not and never did—and, as the law stands, never can enjoy the protection of copyright ; and the questions which arise for decision must be dealt with upon that assumption.

The books both of the appellants and the respondents have in the proceedings been styled abridgments. In the true sense of that word this is an absolute misnomer. Strictly speaking an abridgment of an author's work means a statement designed to be complete and accurate of the thoughts, opinions and ideas by him expressed therein, but set forth much more consisely in the compressed language of the abridger. A publication like that of the appellants or respondents, the text of which consists of a number of detached passages selected from an author's work, often not contiguous, but separated from those which precede and follow them by considerable bodies of print knit together by a few words so as to give these passages, when reprinted, the appearance as far as possible of a continuous narrative, is not an abridgment at all. It only expresses, in the original author's own words, some of the ideas,

P. C.

Macmillan and Company, Limited v. K. and J. Cooper.

Lord Atkinson.

thoughts and opinions set forth in his work. And it is obvious that the learning, judgment, literary taste and skill requisite to compile properly and effectively an abridgment deserving that name would not be at all needed merely to select such scraps as these taken from an author and to print them in a narrative form.

This point is well brought in the following passages from the editions of Copinger's Law of Copyright, published in 1904 and 1915 respectively, *i. e.*, before and after the Copyright Act of 1911. The passages are supported by the authorities relied upon in those editions. The first passage runs thus (p. 39) " To constitute a true and equitable abridgment, the entire work must be preserved in its precise import and exact meaning, and then the act of abridgment, is an exertion of the individuality employed in moulding and transfusing a large work into a small compass, thus rendering it less expensive and more convenient both to the time and use of the reader. Independent labour must be apparent, and the reduction of the size and work by copying some of its parts and omitting others confers no title to authorship and the result will not be an abridgment entitled to protection. To abridge in the legal sense of the word is to preserve the substances, the essence of the work in language suited to such a purpose, language substantially different from that of the original. To make such an abridgment requires the exercise of mind, labour, skill and judgment brought into play, and the result is not merely copying."

That passage is practically reprinted at p. 64 of the edition of 1915. At pp. 148 and 566 the following paragraphs are added. The first runs thus " To constitute a proper abridgment the arrangement of the book abridged must be preserved, the ideas must also be taken expressed in language not copied but condensed. To copy certain passages and omit others so as to reduce the volume in bulk is not such an abridgment as the Court would recognise as sufficiently original to protect the author," and the second thus " From the above cases it seems possible to draw the conclusion that the mere process of selecting passages from works readily accessible to the public is not, but that difficulty in obtaining access to the originals or skill manifested in making or arranging the selection is sufficient to give the character of an ' original literary work ' to the selection."

P. C.
Macmillan and Company, Limited v. K. and J. Cooper.
Lord Atkinson.

The cases referred to in support of the above statements included most of those which had been previously decided: *Lamb* v. *Evens* (1) and *Walter* v. *Lane* (2) amongst them.

The learned Judges in the Appellate Court apparently came to the conclusion that a publication the text of which consisted merely of a reprint of passages selected from the work of an author could never be entitled to copyright. Their Lordships are unable to concur in that view. For instance, it may very well be that in selecting and combining for the use of schools or universities passages of a scientific work in which the lines of reasoning are so closely knit and proceed with such unbroken continuity that each later proposition depends in a great degree for its proof or possible appreciation upon what has been laid down or established much earlier in the book, labour, accurate scientific knowledge, sound judgment touching the purpose for which the selection is made, and literary skill would all be needed to effect the object in view. In such a case copyright might well be acquired for the print of the selected passages.

Section 31 of the Copyright Act, 1911, provides that no person shall be entitled to copyright or any similar right in any literary, dramatic, musical or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this statute or any other statutory enactment for the time being in force. Copyright is therefore a statutory right. S. 1, sub-section 1, of the Act enacts in respect of what it may be acquired ; sub-section 2 of the same section defines its meaning ; S. 2 deals with the methods by which it may be protected, and the moral basis on which the principle of those protective provisions rests is the eighth commandment, "Thou shalt not steal." It is for this reason that Lord Halsbury begins his judgment in *Walter* v. *Lane* (3) with the following words "I should very much regret it if I were compelled to come to a conclusion that the state of the law permitted one man to make a profit and to appropriate to himself what has been produced by the labour, skill and capital of another. And it is not denied that in this case the defendant seeks to appropriate to himself what has been produced by the skill, labour and capital of others. In the view I take of this

1. (1893) 1 Ch. 279. 2. (1900) A C 539.
3. (1900) A C 539, 545.

P. C.

Macmillan and Company, Limited v. K. and J. Cooper.

Lord Atkinson.

case the law is strong enough to restrain what to my mind would be a grievous injustice." It will be observed that it is product of the labour, skill and capital of one which must not be appropriated by another, not the elements, the raw material, if one may use the expression, upon which the labour and skill and capital of the first have been expended. To secure copyright for this product it is necessary that the labour, skill and capital expended should be sufficient to impart to the product some quality or character which the raw material did not possess, and which differentiates the product from the raw material. This distinction is well brought out in the judgment of that profound and accomplished lawyer and great and distinguished Judge, Story, J., in the case of *Emerson* v. *Davies* (4), decided in the United States. Some of the points decided are stated in the headnote to be first, that any new and original plan, arrangement or combination of material will entitle the author to copyright therein, whether the materials themselves be old or new. Second, that whosoever by his own skill, labour and judgment writes a new work may have a copyright therein, unless it be directly copied or evasively imitated from another's work. Third, that to constitute piracy of a copyright it must be shown that the original has been either substantially copied or to be so imitated as to be a mere evasion of the copyright. The plaintiff in the case had compiled and published a book entitled "The North American Arithmetic," described as containing elementary lessons by Frederick H. Amson, the purpose and object of the publication being to teach children the elements of arithmetic. The complaint was that the defendants on a date named had without the plaintiff's consent exposed for sale and sold fifty copies of the plaintiff's said work, purporting to have been composed by the defendant Davis, and had subsequently sold 1,000 copies of the same. The main defence was that the book, copies of which were sold by the defendants, was composed by themselves, and that neither it nor any part of it was copied, adopted or taken from the plaintiff's book or any part thereof. The learned Judge expressed himself thus "The book of the plaintiff is, in my judgment, new and original in the sense in which those words are to be understood in cases of copyright. The question is not whether the materials which are used are entirely new and have never been used before, or even that they have never been used

4. (1843) 3 Story U S Rep 768.

before, for the same purpose. The true question is whether the same plan, arrangement and combination of materials have been used before for the same purpose or for any other purpose. If they have not, then the plaintiff is entitled to a copyright, although he may have gathered hints for his plan and arrangement or parts of his plan and arrangement from existing and known sources. He may have borrowed much of his materials from others, but if they are combined in a different manner from what was in use before. . he is entitled to a copyright. . It is true that he does not thereby acquire the right to appropriate to himself the materials which were common to all persons before, so as to exclude those persons from a future use of such materials ; but then they have no right to use such materials with his improvements superadded, whether they consist in plan, arrangement, or illustrations or combinations, for these are strictly his own. . In truth, in literature, in science and in art there are and can be few, if any, things which in abstract sense, are strictly new and original throughout."

The learned Judge then deals at length with many, indeed most, of the English authorities, and concludes with a remark in these words, which is singularly applicable to the present case "I have bestowed a good deal of reflection upon this case, and at last I feel constrained to say that I am unable to divest myself of the impression that in point of fact the defendant Davies had before him, when he composed his own work, the work of the plaintiff, and that he made it his model and imitated it closely in his title or section of addition and in a great measure in that of subtraction also."

This decision is, of course, not binding on this tribunal ; but it is, in the opinion of the Board, sound, able, convincing and helpful. It brings out clearly the distinction between the materials upon which one claiming copyright has worked and the product of the application of his skill, judgment, labour and learning to those materials ; which product, though it may be neither novel nor ingenious, is the claimant's original work in that it is originated by him, emanates from him, and is not copied.

It was by confounding the materials with the product that Mr. Upjohn endeavoured to sustain the argument that if the appellants obtain copyright in their book any reprint of North's

P. C.

Macmillan and Company, Limited v. K. and J. Cooper.

Lord Atkinson.

Translation would be an infringement of it under S. 8 of the Act of 1911.

Mr. Upjohn also contended, as their Lordships understood him, that Sir Arthur Wilson did not, in his Judgment in the case of *Macmillan* v. *Suresh Chunder Deb* (5), decide the question of the existence of copyright in the anthology entitled "The Golden Treasury of Songs and Lyrics" but that assuming copyright existed he decided merely the question of the infringement of it. That is an extraordinary error. In the long headnote to the case it is stated :—

"The suit was instituted on February 27, 1890, and the plaintiffs complained that the publication of the defendant's book constituted a breach of their copyright and prayed for the usual relief by way of injunction and damages. They contended that, although the copyrights of the works of the original authors had long lapsed, they were entitled to the copyright in the 'selection' made by P (*i. e.*, Mr. Palgrave). It was contended on beahlf of the defendant that there could be no copyright in such a selection ; that if any existed the defendant's book did not infringe it."

The question of the existence of copyright, however, was distinctly raised by the defendant in that case ; and Sir Arthur Wilson is reported to have expressed himself thus concerning it "And first I have to consider whether there is copyright in a selection. There has not, as far as I know, been any actual decision upon this question, but, upon principle, I think it clear that such a right does exist, and there is authority to that effect as weighty as anything short of actual decision can be." He then proceeds to state the law, as he conceived it to be, dealing with the existence of copyright in such work as the "Golden Treasury," in the following words: "In the case of works not original in the proper sense of the term, but composed of or compiled or prepared from materials open to all, the fact that one man has produced such a work does not take away from any one else the right to produce another work of the same kind, and in doing so to use all the materials open to him. But, as the law is concisely stated by Hall, V. C. in *Hogg* v. *Scott* (6), the true principle in all these cases is that the defendant is not at liberty to use or avail himself of the labour which the plaintiff has been at for the purpose of producing his work ; that is, in fact, merely to take away the result of another mans labour or, in other words, his property."

5. (1890) I L R 17 C 951.
6. (1874) L R 18 Eq. 444, 458.

P. C.
Macmillan and Company, Limited v. K. and J. Cooper.
Lord Atkinson.

Sir Arthur Wilson then points out that this principle applies to maps, guide-books, street directories, dictionaries, compilations of scientific work and other subjects, and considers that it applies to a selection of poems. He then gives the reason why it applies to Mr. Palgrave's "Golden Treasury" in the following words "Such a selection as Mr. Palgrave has made obviously requires extensive reading, careful study and comparison, and the exercise of taste and judgment in selection. It is open to any one who pleases to go through a like course of reading, and by the exercise of his own taste and judgment to make a selection for himself. But if he spares himself this trouble and adopts Mr. Palgrave's selection he offends against the principle."

He then proceeds to quote the following passage from Lord Eldon's Judgment in *Longman* v. *Winchester* (7) approved of by Lord Hatherly in *Spiers* v. *Brown* (8) "In the instance mentioned. . a work consisting of a selection from various authors, two men might perhaps make the same selection, but that must be by resorting to the original authors, not by taking advantage of the selection already made by another." Sir Arthur Wilson then adds "I am of opinion that the selection of poems made by Mr. Palgrave and embodied in the 'Golden Treasury' is the subject of copyright, and that the defendant's book has infringed that right."

So far, therefore, from Sir Arthur Wilson not having decided the question whether or not the plaintiffs were entitled to copyright in the "Golden Treasury," he expressly stated it was the first question he had to consider. He devoted the best part of a page of his Judgment to dealing with it. He states explicitly that he was of opinion Mr. Palgrave's selection embodied in the "Golden Treasury" was the subject of copyright and that the defendants had infringed his right, and, as was his custom and method, he expressed in clear, precise and appropriate language what were the grounds upon which this decision rested.

The contention to the contrary is in their Lordships' view wholly unsustainable.

In *Moffat and Paige* v. *George Gill and Sons* (9), Collins, M. R., as he then was, in the course of his Judgment, after

7. (1809) 16 Ves 269, 271. 8. (1858) 6 W R 352, 353.
9. 86 L T 465, 470.

P. C.

Macmillan and Company, Limited v. K. and J. Cooper.

Lord Atkinson.

quoting from Lord Eldon's Judgment in *Longman* v. *Winchester* (7) the passage which Sir Arthur Wilson had quoted, proceeds to say "Then there is also the authority of the gentleman who was well known in these Courts before he went to India, and who afterwards became a distinguished Indian Judge (Sir Arthur Wilson), in which the very point is raised and decided in the case of *Macmillan* v. *Suresh Chunder Deb* (5). In that case the matter in question was the well-known series called the 'Golden Treasury,' which is a series of quotations put together by Mr. Palgrave, and the defendant had reproduced his work practically, superadding notes of his own; and the learned Judge upheld or sustained a claim for infringement. It seems to me that that is precisely what the defendant, Mr. Marshall, did in the present case."

Stirling, L. J. does not expressly mention Sir Arthur Wilson's decision, but Cozens-Hardy, L. J. said that, as he entirely agreed with all that had fallen from his brethren, he did not think it necessary to add anything. It is clear, therefore, that Sir Arthur Wilson's decision in the "Golden Treasury" case was approved of and acted upon by the Court of Appeal in this case and treated, as in their Lordships' view it deserved to be, as a sound decision.

From the preface to the "Golden Treasury" it would appear that the poems in Book IV correspond to the half-century just ended at the time of the publication, and that the proprietors of any copyright pieces which were included in this Book IV gave their permission to Mr. Palgrave for their insertion in his work.

In *Walter* v. *Lane* (3), all the relevant authorities on the question of acquisition of copyright down to August 6, 1900, appear to have been cited, and it was held that a person who makes notes of a speech delivered in public and transcribes them and publishes in a newspaper what purports to be a verbatim report of the speech, is the "author" of the report within the meaning of the Copyright Act of 1842, and is entitled to the copyright in the printed report, and can assign it. Lord Halsbury, in his Judgment, at p. 547, when dealing with the true meaning of the word "author" used in the statute of 1842, points out that every man has a proprietary right in his own

7. (1809) 16 Ves 269, 271.
5. (1890) I L R 17 C 951.
3. (1900) A C 539.

P. C.
Macmillan and Company, Limited v. K. and J. Cooper.
Lord Atkinson.

literary composition, and that copyright is the exclusive privilege of making copies of it created by this statute, which are two wholly different things, and should not be confounded, and re-states the question for decision in these words *Walter* v. *Lane* (3): "The question here is solely whether this book, to use the words of the statute, printed and published and existing as a book for the first time, can be copied by some one other than the producers of it (I avoid the word author), by those who have not produced it themselves but have simply copied that which others have laboured to create by their own skill and expenditure." And further on page 549 he seems to express the view that if the skill labour and accuracy of which he speaks be exercised to reproduce in writing spoken words in a book form, it is, as far as copyright in the written words is concerned, immaterial whether they be wise or foolish, accurate or inaccurate, of literary merit or of no merit at all. Lord Davey in his Judgment pointed out that copyright is merely the right of multiplying copies of a published writing, and has nothing to do with the originality or literary merits of the author or composer, and that the appellant in that particular case only sought to prevent the respondents from multiplying copies of this (the appellant's own report of the speech of Lord Rosebury) and availing himself for his own profit of the skill labour and expense by which that report was produced and published.

The only other authority on the point of the acquisition of copyright to which it is necessary to refer is the case of *University of London Press* v. *University Tutorial Press, Ltd.* (10), in which Peterson, J., dealing with the meaning of the words "original literary work" used in S. 1, Sub-S. (1), of the Act of 1911, says: "The word 'original' does not in this connection mean that the work must be the expression of original or inventive thought. Copyright Acts are not concerned with the originality of ideas, but with the expression of thought; and in the case 'literary work,' with the expression of thought in print or writing. The originality which is required relates to the expression of thought; but the Act does not require that the expression must be in an original or novel form, but that work must not be copied from another work—that it should originate from the author." In their Lordships' view

3. (1900) A C 547, 549. 10. (1916) 2 Ch 601.

P.C

Macmillan and Company, Limited v. K. and J Cooper.

Lord Atkinson.

this is the correct construction of the words of S. 1, Sub-S. (1), and they adopt it.

What is the precise amount of the knowledge, labour, judgment or literary skill or taste which the author of any book or other compilation must bestow upon its composition in order to acquire copyright in it within the meaning of the Copyright Act of 1911 cannot be defined in precise terms. In every case it must depend largely on the special facts of that case, and must in each case be very much a question of degree. But their Lordships have no hesitation in holding that there is no evidence in the present case to establish that an amount of these several things has been applied to the composition of the text of the appellants' book, as distinguished from the notes contained in it, to entitle them to the copyright of it.

As to the notes it is altogether different. Their Lordships do not take the view that these notes are trifling in their nature or are useless. On the contrary, they think that the notes make the book more attractive, the study of it more interesting and informing, enhance its efficiency and consequently increase its value as an educational manual.

Mr. Upjohn contended that these notes were useless because everything in them was to be found in Lempriere's Classical Dictionary or some other classical dictionary. As if the heads of Indian pupils at school and students about to present themselves for a matriculation examination in the Bombay University were as well stored with classical lore of this nature as are these dictionaries, and that these youths had so keen a recollection of all the matters set forth in these substantial volumes that they did not require to refer to them ! If the recollection of the contents of these dictionaries was so faint that they needed to refer to them, it was obviously of advantage to have the information at hand in the notes so that they might dispense with the reference.

Their Lordships are quite of opinion these notes were well chosen, were neatly condensed, were sufficiently copious, were accurate and must have required for the framing of them classical knowledge, literary skill and taste, labour and sound judgment as to what was fitting and useful to be brought to the notice of schoolboys and students about to enter the University. The respondents have not only copied but servilely copied many of these notes. There is no other

P. C.

Macmillan and Campany, Limited v. K. and J. Cooper.

Lord Atkinson.

way of accounting for the absolute verbal identity of some of the notes in both books.

In the case of *Black* v. *Murray and Son* (11) which dealt with the alleged infringement of the copyright in a volume entitled " Minstrelsy of the Scottish Border, " the original edition of which was no longer protected by copyright but a new edition was published to which valuable notes were added. Lord Kinloch, in delivering judgment, dealt with the question of the effect of these notes upon the edition in which they were printed, in a very clear and forcible judgment ; he said (p. 355) " I think it is clear that it will not create copyright in a new edition of a work of which the copyright has expired merely to make a few emendations of the text or to add a few unimportant notes. To create a copyright by alterations of the text these must be extensive and substantial practically making a new book. With regard to notes, in like manner they must exhibit an addition to the work which is not superficial or colourable, but imparts to the book a true and real value over and above that belonging to the text. This value may perhaps be rightly expressed by saying that the book will procure purchasers in the market on special account of these notes. When notes to this extent and of this value are added I cannot doubt that they attach to the edition the privilege of copyright. The principle of the law of copyright directly applies. There is involved in such annotation and often in a very eminent degree, an exercise of intellect and an application of learning which place the annotator in the position and character of author in the most proper sense of the word ..In every view the addition of such notes as I have figured puts the stamp of copyright on the edition to which they are attached. It will still, of course, remain open to publish the text which *ex hypothesi* is the same as in the original edition. But to take and publish the notes will be a clear infringement. "

In *Jarrold* v. *Houlston* (12) the plaintiffs were the publishers of a book written by Dr. Brewer called the Guide to Science. The Vice-Chancellor, Sir W. Page Wood, having fully ascertained the object with which this book was compiled and published and the sources from which Dr. Brewer obtained the information necessary to enable him to write it, stated these matters in the following passage and laid down the principle of law applicable to the facts. He said " If any one by pains

11. (1870) 9 Rettie 341. 12. (1857) 3 K & J 708.

P. C.
Macmillan and Company, Limited v. K. and J. Cooper.
Lord Atkinson.

and labour collects and reduces into the form of a systematic course of instruction those questions which he may find ordinary persons asking in reference to the common phenomena of life, with answers to those questions and explanations of those phenomena, whether such explanations and answers are furnished by his own recollection of his former general reading or out of works consulted by him for the express purpose, the reduction of the questions so collected with such answers under certain heads in a scientific form, is amply sufficient to constitute an original work of which the copyright will be protected. Therefore I now have no hesitation in coming to the conclusion that the book in question is in that sense an original work and entitled to protection." The defendants were publishers of a book called "The Reason Why," which was published in parts styled lectures. The Vice-Chancellor held that the second lecture contained piratical matter, as did also apparently all the lectures from Nos. 3 and 5 to 25 inclusive. The Vice-Chancellor made an order restraining the defendants from publishing the book " containing the lectures numbered 2, 3, and from 5 to 25 inclusive. "

Following that precedent their Lordships have come to the conclusion that the appellants are not entitled to a copyright in the text of their book extending from pp. 1 to 82 thereof both inclusive, but are entitled to copyright in the notes printed in pp. 83 to 94, both inclusive. They will therefore humbly advise His Majesty that the decree of the High Court in its Appellate Jurisdiction, dated October 13, 1921, should be set aside with costs, and that the decree of Fawcett, J., of March 19, 1921, should be amended by inserting after the words " mentioned in the plaint herein " the words " containing the notes and glossary printed on pp. 83 to 94, both inclusive, of the said book or any of them, or any portion or portions of the said notes or any passage or passages from the same," and directing that the respondents should pay to the appellants all the costs of the hearing of the action before that judge, and that subject to these amendments that the decree of the first Court ought to be affirmed.

Under the circumstances the parties will bear their own costs of this appeal.

Solicitors for appellants *Sandersons* and *Orr-Dignams*.

Solicitors for respondents *T. L. Wilson and Co.*

PRIVY COUNCIL.

PRESENT :—LORD ATKINSON, LORD WRENBURY AND LORD PHILLIMORE.

Marwadi Ramjivan Nevatia, a firm *Appellants** (*Defendants*)

v.

H. Bhikaji and Company *Respondents* (*Plaintiffs*).

(On appeal from the High Court of Judicature at Bombay.)

P. C.
Marwadi Ramjivan Nevatia
v.
H. Bhikaji and Company.

Contract for sale of goods—Numbers on packages not material or of the essence of the contract unless descriptive of the quality of the contents—Mistake—Indian Contract Act (IX of 1872), Ss. 109 to 118.

A contract-note for the sale of bales of Long Cloth in course of maunfacture described some of them as bearing numbers "139" and "141," whereas from previous contracts in respect of the sale of the identical bales (beginning from that of the original vendor, who, in ordering them from the Mills, had required his numbers "739" and "741" respectively to be printed upon them) gave the numbers as "739" and "741" respectively, and not "139" or "141."

Held, (affirming the decision of the High Court of Bombay in its appellate jurisdiction) that, as the numbers in the contract had no specific meaning in the market, and were merely reference numbers, the figures "139" and "141" being mere clerical errors for "739" and "741" respectively, did not constitute a warranty of the goods or, indicate their quality or description.

Appeal from a decree of the High Court of Judicature at Bombay, reversing a decree of the said Court in its Original Jurisdiction.

The respondents sued the appellants for the sum of Rs. 11,746-1-9, damages for alleged breach by the latter of a contract to purchase from the former 51 bales of long cloth, being portion of 92 bales comprised in a (Gujarati) *kabala* or contract between the parties, dated the 1st August, 1918, and translated as follows :—

"Vendor—H. Bhikhaji & Co.
"Purchaser—Ramjivan Nevatia.
"Through broker Ratanseybhai.
"The 9th of Ashad Vad of Samvat 1924.
"Thursday (1st August, 1918).
"Bales 15, Pieces......No. 732 lbs. 5—14.
"Bales 29, Pieces..........736 lbs. 6—11.
"Bales 10, Pieces..........139 lbs. 7 1|4.
"Bales 38, Pieces..........141 lbs. 7—10.

"Total bales 92 (ninety-two) of the Hinganghat Rekchand Mills under manufacture. Delivery thereof is to be taken from August to October, 1918

*P C Appeal No. 28 of 1923. 1st February, 1924.

P. C.

Marwadi Ramjivan Nevatia
v.
H. Bhikaji and Company.

as the same may arrive manufactured. These goods are sold to you on the terms of the contract of the merchant from whom we have purchased. No objection shall be taken if these goods arrive late or early by a month. Rate thereof per lb. is Re. 1 per bale.

(Sd.) RAMJIVAN NEVATIA.

Bales 92."

This contract was, in fact, the fifth re-sale of the long cloth specified in it, beginning from that of one Ghya, the original vendor, who had ordered the manufacture thereof from the said Mills. The four previous contracts specified the numbers of the last two lots as "730" and "741" (and not "139" and "141" respectively as above).

On 13th August, 1918, the appellants relying on the above contract with the respondents, contracted to sell the aforesaid bales to one Gopalji Virji at a small profit, but otherwise on terms similar to those contained in the contract hereinbefore set forth. The respondents sent to the appellants from time to time Delivery Orders comprising, in addition to the bales bearing Nos. 732 and 736, 10 bales bearing No. 739 (not No. 139, as specified in the contract), and 38 bales bearing No. 741 (not No. 141, as specified in the contract). On the 22nd October, 1918, the appellants took delivery of, and paid for, 1 bale bearing No. 741 under a Delivery Order dated 21st October, 1918, and their Moonim, in the course of his duty, recorded this fact and number in their account-books. The respondents subsequently in November 1918, when the market began to fall heavily, sent to the appellants other Delivery Orders, dated as follows:—(*a*) 9th November, 1918, for 3 bales bearing No. 732, 9 bales bearing No. 739, and 22 bales bearing No. 741; (*b*) 28th November, 1918, for 1 bale bearing No. 732, 1 bale bearing No. 739, and 15 bales bearing No. 741. The appellants, in their turn, sent to their purchaser (Gopalji Virji) Delivery Orders which reproduced the numbers written in the respondents' Delivery Orders, and he took delivery from the appellants of the said 1 bale bearing No. 741 but by his solicitor's letters of the 29th and 30th November, 1918, he called upon the appellants to take back that bale, stating that it had just been discovered that it bore No. 741 instead of No. 141, and declined to take delivery of any bales bearing No. 739 or No. 741 on the ground that the bales so numbered were not contracted by him to be purchased. Thereupon, the appellants similarly declined to take

delivery of any bales so numbered, and called upon the respondents to take back, and refund the price of, the 1 bale bearing No. 741, which they said they had accepted and paid for through an oversight. In the course of correspondence which followed, the respondents alleged that the figures "139" and "141" in the *kabala* were clerical errors for "739" and "741" respectively. On 5th December, 1918, however, the appellants cancelled the contract in respect of all bales bearing No. 739 or No. 741, and refused to accept any of such bales. Thereupon, the respondents caused the 51 bales bearing such numbers as aforesaid to be sold on the appellants' account and risk, and subsequently (6th February, 1919) filed the present suit. At the trial they submitted that the numbers on the bales had no meaning to any one except the original vendor, and that the goods were not known on the market by these or any other specific numbers. In support of this, the manager of the Hinghanghat Mills whom they called, deposed as follows

"We give the numbers mentioned in the contract according to the requirements of the merchants. The numbers do not represent any quality. We put on any number that the merchants want us to put on except the numbers which may have been given to another merchant. The length and width of the goods we manufacture are not constant, but are according to the directions given by the merchants."

As against this, the defendants maintained that the numbers were an essential and integral part of the contract, the quality and width of the goods.

The trial Judge (Kajiji, J.) on the 16th August, 1920, held that the goods tendered were not those contracted for, and concluded as follows :—

"To my mind, there must be some importance attached to these numbers. They are not there merely to signify to the original purchasers from the Mill, Messrs. Ghya & Co., that 739 has reference only to the width of the Long Cloth, and that the last two digits have no reference to the width or length. None of these witnesses could say what they were therefor. All these witnesses were, however, bound to admit that if anybody asked for Long Cloth of a particular number, then they would ask him of what Mills, and this itself shows that these numbers had some significance and, therefore, were descriptive of the quality of the goods. To my mind, it is really too absurd, if I may be allowed to say so, that these numbers have no bearing at all on the market. They do have some bearing—perhaps very little. It is, after all, really descriptive of the goods and, to a certain extent, of the quality of the goods ; because it is admitted that Long Cloth of this very Mill of the same size in width and length but bearing different numbers, could be of the same quality and *vice versa*, and

P. C.

Marwadi Ramjivan Nevatia v. H. Bhikaji and Company.

it could also be of different quality. If that is so, then Nos. 139 and 141 and any other number would be really descriptive of the goods."

He accordingly dismissed the suit. On appeal, a Division Bench of the High Court (Macleod, C. J. and Shah, J.) on the 1st July, 1921, set aside this decree, and passed a decree in favour of the respondents for 47 out of the 51 bales (disallowing the claim as regards the other 4 bales sued for), *i. e.* 10 bales bearing No. 139, and 37 (out of 38) bearing No. 141.

In the course of his Judgment, the Chief Justice remarked as follows :—

"The defendants, as far as I can gather, do not ask us to believe that the numbers 139 and 141 described the quality of the goods, and could not have done so, because it is obvious on the face of the contracts that the goods were all of the same quality, whatever number might appear on the bales. Nor, for the same reasons, can it be suggested that these goods were sold in the bazaar by their numbers. There was no evidence that these numbers had acquired a particular reputation in the bazaar so that a purchaser would ask for No. 732 or No. 139 in order to secure cloth of a particular description. As a matter of fact, the numbers mentioned in all these contracts had no reputation and contained no information for purchasers in the market. The goods were Long Cloth—a very general description. To those engaged in the trade the weight per piece and the price would convey all the information which was required. But it was contended that the defendants, having purchasd bales numbered 139 and 141, if they wanted all the particulars regarding width and length and pieces per bale, would have to go to the Mills, and therefore, the number was an essential part of the contract. But this argument can be of little weight because, if they had gone to the Mills, they would have ascertained that the bales tendered bearing numbers 739 and 741 contained the cloth they had contracted to buy.

"The defendants therefore must be thrown back upon the case set up by them in their Written Statement, that they had contracted for bales bearing particular numbers, and any bales tendered bearing different numbers were not contract goods.........

"Now it is clear from the evidence that the numbers put by the Mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya & Co. they indicated the width of the pieces in each bale. When the bales passed out of their hands, they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece..........

"The defendants then can only succeed on the case set up by them in their Written Statement that they had contracted to buy bales with a particular number on them, and that a tender of bales bearing a different number would not be a good tender under the contract. If the number is an essential part of the contract, then it does not matter what it indicates. If *A* agrees to buy

P. C.

Marwadi Ramjivan Nevatia v. H. Bhikaji and Company.

from *B* a bale of certain goods, stipulating it must have a particular number on it, then he is entitled to refuse a bale bearing a different number. It is no answer for *B* to say 'In all other respects the bale is according to the contract.' It may be difficult to ascertain the dividing line in the case of contracts like the one in suit. In the contract different numbers are assigned to each lot at any rate that indicates that the contents of the bales in each lot differ in some respects, though how they differ is not indicated. Ghya & Co. alone held the key to that. If the Mills had put different numbers on the bales to those ordered, they might have raised objection. But those considerations would not apply when the goods passed out of their hands.

"On the best consideration I can give to the evidence, I have come to the conclusion that the defendants attached no importance to the numbers mentioned in the contract. At the most, they were entitled to point out to the plaintiff that the numbers in the Delivery Order did not correspond with the numbers in the contract, which might well indicate that the goods tendered were not contract goods. The onus would then lie on the plaintiffs to show that the goods tendered were contract goods. That is exactly what the plaintiffs say did happen when the defendants first discovered a wrong number in the Delivery Order of the 22nd October......

"I think, therefore, it was not an essential part of the contract in suit that these bales should bear numbers 139 and 141, that the defendants were entitled to an explanation when bales numbers 739 and 741 were tendered, and that the plaintiffs have given a satisfactory explanation by showing that the goods tendered were the goods contracted for."

The defendants thereupon appealed to the Privy Council, and the only question in this appeal was whether the appellants as buyers were justified in their rejection of the said bales bearing No. 739 and No. 741. No question arose as to any of the bales which were to bear No. 732 or No. 736.

1st February, 1924. *Dunne, K. C.* and *Jardine* for appellants :—The appellants had contracted to buy, and the respondents had contracted to deliver bales, and the pieces of cotton cloth therein, bearing the numbers specified in the contract, and not those bearing any other numbers. The numbers were an essential part of the description of the contract goods. The goods tendered by the respondents were not those contracted for. The rights of the appellants under the contract were not affected by constructive notice of the respondents' contract of purchase. [The Indian Contract Act, Ss. 119—128 were referred to].

Sir George R. Lowndes, K. C. and *Raikes* for respondents were not called upon.

The Judgment of their Lordships was delivered by

P. C.

Marwadi Ramjivan Nevatia v. H. Bhikaji and Company.

LORD ATKINSON :—Their Lordships have carefully considered this case during the adjournment and they do not think it necessary to call upon Counsel for the respondents. They think it is clear upon the facts that the first purchaser of these goods can get any number put upon them which he pleases ; that is to say that the owner of goods in the hands of a mill-owner can have this done. When the numbers are attached to the goods in that way, the view their Lordships entertain is correctly expressed in the Judgment of the High Court printed at page 45 of the record.

"The numbers put by the Mills on the bales at the request of the original purchasers would convey no meaning to an outsider. To Ghya & Co. they indicated the width of the pieces in each bale. When the bales passed out of their hands they were merely reference numbers. It would have been just the same if the numbers had been 501 and 502. There was no evidence that it was recognised in the market that the last two digits in the number of a bale would indicate the width of each piece."

In their Lordships' view the numbers when so put on indicate these particular goods. They do not give any warranty or indication of the quality or description.

Their Lordships will therefore humbly advise His Majesty that the appeal fails ; that the decree of the High Court should be affirmed and this appeal dismissed with costs.

Solicitors for appellants : *Hallowes* and *Carter*.

Solicitors for respondents *T. L. Wilson and Co.*

A. D. M. *Appeal dismissed.*

PRIVY COUNCIL.

PRESENT :—LORD SHAW, LORD PHILLIMORE, LORD BLANESBURGH, SIR JOHN EDGE AND LORD SALVESEN.

Mussammat Durga Devi and another *Appellants*

v.

Shambhu Nath and others *Respondents.*

(On appeal from the Chief Court of the Punjab.)

Hindu Law— Adoption— Validity of—Family custom —Kashmiri Brahmins —Punjab Laws Act, IV of 1872—Concurrent findings of trial Judge and Appeal Court in India.

P. C.
Mussammat Durga Devi
v.
Shambhu Nath.

In proving family customs in India, the rules of English Law as to particular customs are inapplicable. *Soorendranath Roy* v. *Heeramonee Burmoneah,* (1868) 12 Moo. I. A. 91 and *Abdul Hussein Khan* v. *Bibi Sona Dero,* 45 I A 14, referred to.

In an issue as to the fact or validity of an alleged adoption under Hindu Law, concurrent findings of the trial Judge and Appeal Court in India, even though based on apparent different and distinct reasons, will not be interfered with. *Lakshmappa* v. *Ramava,* 12 Bom H C R 364, *Maharaj Narain* v. *Banoji,* 42 P R 147, referred to.

Appeal by special leave of His Majesty in Council, against a Judgment (10th March, 1916) and amended decree (18th February, 1918) of the Chief Court of the Punjab at Lahore (Leslie Jones and Shadi Lal, JJ.) reversing a Judgment and Decree (31st July, 1914) of the District Judge at Amritsar (M. Zafar Ali, Esq.), dismissing the claim of the appellants for possession of certain landed property.

The facts of the case sufficiently appear from the Judgment of their Lordships.

29th January, 4th, 5th February, 1924. *De Gruyther, K. C.* and *Parikh* for appellants.

Sir George Lowndes, K. C. and *Raikes* for respondents.

26th February, 1924. The Judgment of the Board was delivered by

Sir John Edge.

SIR JOHN EDGE :—This is an appeal by Mussammat Durga Devi and her minor son, Kali Sahai, two of the defendants to the suit, from a decree, dated the 10th March, 1916, of the Chief Court of the Punjab, which reversed a decree, dated the 31st July, 1914, of the District Judge of Amritsar, which had dismissed the suit. The respondents are Shambhu Nath, who is the plaintiff in the suit, and Arjan Singh and

P. C.
Mussammat Durga Devi v. Shambhu Nath.
Sir John Edge.

Nathu Mal, who are two of the defendants to the suit and have taken no part in this appeal or in the litigation.

The pedigree of the family to which Shambhu Nath belonged is as follows :—

Devi Das =
Kashmiri Brahmin

Hari Ram =
Two sons. Shambhu Nath third son, alleged to have been adopted by Ram Chand after the death of Amar Nath, Plaintiff, respondent.

Ram Chand =
Amar Nath, Adopted son. Died in the lifetime of Ram Chand, sonless. = Indiani, Died July, 1913.

Durga Devi a defendant, Appellant. = Manohar Nath

Kali Sahai, a minor, a defendant, appellant.

The suit was brought in the Court of the District Judge of Amritsar on the 21st October, 1913, for a decree for the possession of two houses, a well, a *kothri* and a shop in Amritsar, of which the plaintiff alleged that he, as the adopted son of Ram Chand, was the owner. His case is that he was adopted by Pandit Ram Chand in September, 1896, who was the owner of the property in question, and died on the 13th July, 1897. The case of the defendants Durga Devi and Kali Sahai, her minor son, is that plaintiff was not adopted by Ram Chand, and that the suit is barred by the law of limitation. The other two defendants, who have no title if the plaintiff is the adopted son of Ram Chand and is not debarred from maintaining the suit by the law of limitation, did not defend the suit, and were, by an amendment of the decree of the Chief Court, made not liable for costs.

It will be convenient to consider whether Shambhu Nath was validly adopted by Ram Chand, before considering whether Shambhu Nath's suit is barred by the law of limitation.

P. C.

Mussammat Durga Devi v. Shambhu Nath.

Sir John Edge.

Shambhu Nath was the third son of Hari Ram, a brother of Ram Chand. They belonged to a family of Brahmins which came from Kashmir and settled in Amritsar in the Punjab, and S. 5 of Act IV of 1872 (the Punjab Laws Act as amended) applied to that family of Kashmiri Brahmins. By that section it is, so far as is material to this suit and appeal, enacted as follows :—

"5. In questions regarding succession, adoption, or any religious usage, the rule of decision shall be—

(*a*) any custom applicable to the parties concerned, which is not contrary to justice, equity or good conscience, and has not been by this or any other enactment altered or abolished, and has not been declared to be void by any competent authority ;

(*b*) the Muhammadan Law, in cases where the parties are Muhammadans, and the Hindu Law, in cases where the parties are Hindus, except in so far as such law has been altered or abolished by legislative enactment, or is opposed to the provisions of this Act, or has been modified by such custom as is above referred to."

The adoption alleged in this suit to have been made was an adoption applicable by custom to the family of Kashmiri Brahmins, to which Ram Chand and Shambhu Nath belonged, and had not been altered or abolished or declared to be void.

At the date of the alleged adoption, Shambhu Nath was 17 years old, and he had been invested with the sacred thread, that is, the ceremony of *Upanayana* had already been performed upon him. There was no evidence as to what school of Hindu Law Kashmiri Brahmins living in Kashmir are subject to, and it has not been suggested that this family of Kashmiri Brahmins was living in the Punjab subject to any school of Hindu Law peculiar to Kashmir. They were, however, Brahmins by caste, and consequently were Hindus of a twice-born class.

In considering whether a family custom as to adoption was proved in this suit, it is advisable to bear in mind what Lord Buckmaster said in delivering the Judgment of the Board in *Abdul Hussein Khan* v. *Bibi Sona Dero* (1), as to the proof of family customs in India. After pointing out that it is incumbent upon a plaintiff to allege and prove the custom upon which he relies, Lord Buckmaster said :—

"Their Lordships have carefully considered the difficulty of applying all the strict rules that govern the establishment of custom in this country to circumstances which find no analogy here. Custom binding inheritance in a

1. 45 I A at p. 14.

P. C.
Mussammat Durga Devi v. Shambhu Nath.
Sir John Edge.

particular family has long been recognized in India (see *Soovendranath Roy* v. *Heeramonee Burmoneah* (1868, 12 Moo. I. A. 91), although such a custom is unknown to the law of this country, and is foreign to its spirit. Customs affecting descent in certain areas or customs affecting the rights of inhabitants of a particular district are perhaps the nearest analogies in this country. But in England, if a custom were alleged as applicable to a particular district, and the evidence tendered in its support proved that the rights claimed had been enjoyed by people outside the district, the custom would fail. This principle, however, it seems to their Lordships, ought not to be applied in considering such a custom as the one claimed here since, if the custom were in fact well established in one particular family, whether it were enjoyed or no by another family, would not affect the question, since the custom might be independent in each case, and the evidence would not establish that the custom failed by reason of the inability to define the exact limits within which it was to be found when once it was established that, within certain and definite limits, it undoubtedly existed."

There are concurrent findings of the trial Judge and the Chief Court that Shambhu Nath was in fact adopted by Ram Chand, and there was evidence upon which those Courts could so find, and those findings as to the factum of the adoption must be accepted as conclusive. Each Court also found that the adoption was valid, but apparently for different reasons. The trial Judge apparently relied for his finding that the adoption was valid, not upon the evidence as to custom, but upon a Judgment of the Bombay High Court in *Lakshmappa* v. *Ramava and others* (2), to which this family of Kashmiri Brahmins were not parties. He also referred to Trevelyan's *Hindu Family Law,* edition of 1908, page 148. He did not, however, express any opinion that, on the evidence before him in this suit, the adoption was invalid. He, however, dismissed the suit on the ground set up by Mussammat Durga Devi and her son in their written statement that the suit was barred by the law of limitation. He dismissed the suit without costs. From that decree Shambhu Nath and Mussammat Durga Devi and her son appealed. The Chief Court found on the evidence that, by the custom of this family, the adoption was valid, and that the suit was not barred by limitation, and decreed the suit with costs. The Chief Court dismissed the appeal of Mussammat Durga Devi and her son with costs.

Shambhu Nath, the plaintiff, did not in his plaint state in what particular form he had been adopted by Ram Chand, but he alleged in his plaint that he was the adopted son of Ram Chand, and that Ram Chand, son of Pandit Devi Das, by caste a Kashmiri Pandit, resident of Amritsar, had been the

2. 12 Bom. H C R. 364.

P. C.

Mussammat Durga Devi v. Shambhu Nath.

Sir John Edge.

owner of the property, specified in his plaint, in respect of which he, Shambhu Nath, claimed a decree for possession. As Shambhu Nath had been adopted in September, 1896, openly and in the presence of many members of the brotherhood, the form of his adoption must have been perfectly well known in the family and by Mussammat Durga Devi. In the written statement which she filed in the suit on behalf of herself and her son, she confined herself so far as the question of Shambhu Nath's adoption was concerned, to a simple denial that Shambhu Nath was the adopted son of Ram Chand. On those pleadings, Shambhu Nath was, in order to succeed in his suit, bound to prove that he had been validly adopted.

On behalf of Shambhu Nath several witnesses were called most of whom were members of the *Biradri*, and all of whom, so far as appears, were persons of respectability. Some of them who were members of the *Biradri* lived in Amritsar, others lived in Lahore. Ram Chand was a Guru, that is, a religious teacher and spiritual guide amongst these Kashmiri Brahmins of Amritsar, and was obviously much respected, and he must have known what were the essentials to a valid adoption in the family to which he belonged. As has already been mentioned, Shambhu Nath was 17 years old when the adoption took place, and he had been then already invested with the sacred thread ; those are facts which must have been known by the members of the *Biradri* and by other friends of the family who attended the adoption, several of whom gave evidence in support of his case. It is not suggested that any one who attended the adoption had questioned in any way the right to validly adopt in this family a boy or young man who had previously been invested with the sacred thread. Not one question was put in cross-examination of any witness for the plaintiff to suggest that Shambhu Nath could not have been validly adopted because he had been previously invested with the sacred thread, and the cross-examination of the plaintiff's witnesses was directed to make out a case that the adoption was invalid by reason of Shambhu Nath having been 17 years old when the adoption took place. There was abundant evidence that there was no limit of age for a valid adoption in his family, and the contention that there was a limit of age within which a valid adoption could be made in this family was subsequently abandoned. After the plaintiff's evidence had been closed, some witnesses were called on behalf of Mussammat Durga

P. C.

Mussammat Durga Devi v. Shambhu Nath.

Sir John Edge.

Devi and her son. Who, if their evidence was believed, proved that a boy of 17 years of age could not be adopted.

One of the witnesses for the defendants-appellants was Kishori Lal, a Kashmiri Pandit of Delhi. He stated that "a boy who has gone through his *janaoo* ceremonies (ceremonies of investiture with the sacred thread) can never be adopted," and " we follow Mitakshara." It may be mentioned with regard to his evidence that the Chief Court of the Panjab had held in *Maharaj Narain* v. *Banoji*, (3), that Kashmiri Brahmins of the Delhi District were proved to be governed in matters of adoption by custom, and not by the principles of the Mitakshara form of Hindu Law.

Another witness for the defendants appellants was Mohan Lal, a Kashmiri Brahmin of Lahore. He stated that " a boy who has gone through the *janaoo* ceremony cannot be adopted," and " we follow Dharam Shastar in matter of *janaoo* and adoption" ; he further stated " according to Hindu Law, *janaoo* ceremonies cannot be performed after the age of 11 or 12 years. I do not know whether there is any age restriction as regards adoption. I have not read the Hindu Law." It is not necessary for their Lordships to consider what is the law of the Mitakshara or of the Dharma-Sutras, as the question on which this suit depended is one as to a custom of adoption in this family of Kashmiri Brahmins. The plaintiff was not entitled to call rebutting evidence on the question of adoption as his case as to the alleged adoption had been closed.

After a careful consideration of the evidence, their Lordships have come to the conclusion that Shambhu Nath was validly adopted by Ram Chand. His adoption was recognised as valid by the *Biradri* and by the friends of the family, and, so far as appears, its validity was not questioned by any one from 1896 until the present dispute arose in 1913. When Ramchand died, his brother Hari Nath and two elder sons of Hari Nath were living, but it was Shambhu Nath who performed the funeral obsequies of Ram Chand and of Ram Chand's widow ; and on Ram Chand's death Shambhu Nath succeeded him as the Guru. It was Shambhu Nath who gave Mussammat Durga Devi away in marriage, and it was Shambhu Nath who paid the not inconsiderable expenses of the marriage.

The contention of the appellants that this suit is barred by the law of limitation on the ground that Mussammat Umraoti,

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3. Vol. 42, Punjab Record for 1907, p. 147.

P. C.

Mussammat Durga Devi v. Shambhu Nath.

Sir John Edge.

the widow of Ram Chand, and Mussammat Indrani, and, after her, Mussammat Durga Devi held adverse possession of the property in suit for more than 12 years was, in the circumstances of the case, in their Lordships opinion an impudent and unfounded contention of the appellants. The family house at Amritsar was naturally the proper place in which Umraoti, Indrani and Durga Devi until her marriage should live. Shambhu Nath permitted them as female members of the family to live in that house. He had obtained employment at Lahore in the service of the railway company. The rents of the property at Amritsar were trifling, and he allowed Umraoti, Indrani and Durga Devi to enjoy these rents for their maintenance as female members of his family. There was no 12 years' adverse possession of any of the property in suit.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants *Downer* and *Johnson.*

Solicitors for respondent *Ranken, Ford* and *Chester.*

A. D. M. *Appeal dismissed.*

[END OF VOL. XLVI.]

GENERAL INDEX.

VOL. XLVI

Achu palisha. PAGE.

Achu palisha—Not rent—A kind of royalty—Valuation of suit relating to—Court Fees Act, S. 7, cls. (1), (4) (*e*) and 11 (*f*)—Applicability—Proper basis 377

Act of Court—Party misled by—Should not be prejudiced — Court giving inaccurate figure as auction purchase-money—Payment by judgment-debtor not made in full —Delay to be excused—Madras Estates Land Act, S. 131 ... 329

Adverse possession—Inam- Karnam service—Enfranchisement 462

——— Mortgage void—Mortgagee in possession under—Sale void in favour of—Possession under—Sale void in favour of—Possession held under for 12 years—Effect—Rights of parties 501

Appellate Court—When may reverse trial Judge's conclusion as to credibility of witness—Weight of evidence—Not same as credibility 334

Arbitration—Appointment of guardian by—Not a matter of private interest—Illegality 179

Arms Act, S. 19 (e)—Servant—Use of gun for his own purposes in absence of master —Conviction of, for offence under S. 19 (*c*) —Legality —Confiscation of gun—Order of —Validity —Conditions 401

Award—Money payable under—Suit to recover—Small Cause nature 51

Bombay Municipality—Lands required for street improvements—Acquisition—Contiguous land—City of Bombay Municipal Act (1888), Ss. 296, 91 169

Burmese Buddhistic Law--Inheritance--Children by first wife—Claim to share in inheritance of father as against their step-mother—Partition between children and father allotting specific shares to father—Effect—Contract—Construction—Conduct of parties—Evidence of—Admissibility—Burmese Buddhistic Law—Wife—Position of--Arrangement between father and children by first wife—Partnership or partition arrangement—Deed—Construction 618

C. P. Code, S. 20. PAGE.

Burmese Law—Adoption—Keittima adoption —Ceremonies necessary—Proof of adoption—*Quantum*— Witness- - Credibility — Trial Judge—Opinion of—Appeal—Interference in—Propriety—Award—Validity—Arbitrators—Misconduct—Award based on —Finding in award—Release given in pursuance of award—Binding character of ... 344

Civil Procedure Code, S. 11—*Res judicata*—Finding adverse to defendant, but suit dismissed—Defendant deprived of costs on account of the finding—If finding is *res judicata* in later suit. 515 *at* 520

———**S. 11, (Expln. IV)**—Suit by minor's next friend—Ground of attack not raised—Subsequent suit by another next friend—Whether the ground of attack open- "Might and ought"—Constructive *res judicata* 291

———**S. 11 and O. 32, R. 4** (3)—Minor defendant-, Appointment of guardian-ad litem —Consent of guardian—Express or implied consent—*Ex parte* decree against minor —Execution sale—Binding character of—Prior suit by minor through next friend to set aside the sale—Dismissal of—Subsequent suit by minor to set aside the decree —Bar of *res judicata* 291

———**S. 11**—Heard and finally decided—Decree in favour of a party—Adverse finding not *res judicata* 198

———**S. 20**—Award— Application under Sch. II, Para. 20 for filing award—Jurisdiction—Subject-matters of award in different jurisdictions—Application under Sch. II, Para. 20 to file award to which Court can be made—Jurisdiction—Objection to —Privy Council Appeal—Maintainability for first time at hearing of—Costs of Privy Council Appeal and of Courts below—Disallowance of, to successful appellant—Grounds—Appeal allowed on ground not raised in Courts below if one of 628

———**(Act V of 1908), S. 20**—Commission Agent—Suit to recover price of goods entrusted to—Cause of action—Jurisdiction—Offer—Acceptance—Money intended to be paid to principal—Places of—Jurisdiction of Court at 371

C. P. Code, S. 20-(c). PAGE.

——S. 20 (c)—Cause of action—Sale of goods by Calcutta firm to Madras firm—Payment of price by hundis —Suit for recovery of money overpaid—Forum 82

——S. 21—Principle of—If applicable to execution proceedings 250

——Ss. 37 to 39—Territorial jurisdiction —Transfer of, between passing of decree and executing of it—Jurisdiction of Court passing decree to order delivery of property in execution—Transfer of jurisdiction between filing of execution application and order for delivery of property in execution—Validity of order—Submission to jurisdiction by judgment-debtor—C. P. Code, S. 21—Execution Proceedings—Applicability to ... 250

——S. 47—Execution of decree—Application by decree-holder's legal representative—Defences open on—Estoppel personal to legal representative if open—Agreement prior to decree—Plea of, if open 240

——(1908), S. 47—Sale Proclamation—Order settling—Order in which property is to be sold—Order settling—Appeal from—Maintainability 192

——S. 47, O. 21, Rr. 22 and 90—Indian Limitation Act, Arts. 166 and 181—Execution sale without notice under O. 21, R. 22 where such notice is necessary — Sale, void and not merely voidable—Application to set aside a void execution sale, governed by Article 181 of the Limitation Act and not by Article 166—Failure to give notice under O. 21, R. 22, whether an irregularity in publishing or conducting the sale within the meaning of O. 21, R. 90 104

——S. 47 and O. 21, R. 66—Sale proclamation—Settling the terms of—If ministerial or judicial—Whether an appeal will lie 71 *also* 192

——S. 52—Property of deceased—Income of accused since death of deceased and come into hands of representative if included in — Attachment of income — Decree-holder's right of—Realisation of amount attached—Procedure—Full Bench —Reference of case to—Propriety—Conditions 261

——S. 53 — Decree — Not limited to money-decrees—Hindu father—Decree for possession against — May be executed against undivided sons in possession—Suit against father in a representative character. 471

——S. 64—Attachment in execution of money decree— Immoveable property — Prior contract to sell—Sale pending attachment in pursuance of contract—If prevails over intermediate attachment ... 361

——S. 102—Small Cause Court — Suit cognizable by— Award— Money payable under—Suit to recover—Second Appeal in —Award — Suit to enforce— If suit to enforce contract 51

C. P. Code, O. 21, R. 22. PAGE.

——Ss. 104 and 109—Appeal to His Majesty in Council from a final appellate order in India filing an award—Competency. 628 *at* 634-5

——S. 109—Final Order — Revision—Order of High Court refusing to interfere in 357

——Ss. 109 (c) and 110—Leave to appeal to His Majesty in Council—"Substantial question of law"— Acknowledgment of debt 239

——S. 111—Leave to appeal to His Majesty in Council—Order of a single Judge of the High Court in revision under S. 115, C. P. Code or S. 107 of the Government of India Act — Letters Patent (Madras), Cls. 39 and 44 117

——S. 115—Court—Collector refusing to refer under S. 18 of the Land Acquisition Act, 1894—Whether acting judicially—Not a court—Not subordinate to High Court—Revision—S. 107 of Government of India Act 209

——S. 115—Court Judge holding election inquiry— Under Rules under S. 57 of Madras Local Boards Act XIV of 1920—If Court or *persona designata* 201

——S 151—Inherent power—Suit disposed of—Minors—No proper representation—Decree declared not binding—Restoring suit to the file—Addition of parties —Powers of Court 348

——O. 1, R. 10 and O. 22, R. 10—Mortgage suit—Preliminary decree—Addition of parties 368

——O. 4, R. 1—Presentation of plaint of Judge outside Court and out of office hours—Validity of 78

——O. 7, Rr. 10 and 11 — Plaint stamped on wrong valuation—Requisition proper stamp—Rejection if not complied with—On correct valuation (and payment) Court having no jurisdiction — Returning the plaint—Procedure—Steps in 345

——O. 8, R. 5—Imputation of liability in a plaint— Non denial in the written statement—If sufficient acknowledgment by defendent—Limitation Act, S. 19—Acknowledgment implied 1

——O. 11, Rr. 14 and 21—Order for production of documents — Non-compliance with—Dismissal of suit not justified ... 350

——O 20, R. 12—Mesne profits (future) awarded by preliminary decree for possession—Application for ascertainment of—Maintainability—*Resjudicata*—Prior execution petitions praying for same relief—Dismissal of, but not on merits—Effect 346

——O. 21, R 22—Notice under—Failure to issue—Illegality—Execution sale void—Whether an irregularity in publishing or conducting the sale—C. P. Code, O 21, R. 90 104

C. P. Code, O. 21, R. 57. PAGE.

———O. 21, R. 57, O. 38, Rr. 8 and 11—Attachment before judgment — Decree subsequently passed in the suit—Execution of the decree—Dismissal of execution petition owing to the default of decree holder—Attachment ceases 415

———O. 21, R. 66—Sale proclamation—Settling terms of—If a Judicial Act. 71 *also* 192

———O. 21, R. 71—Order for payment of deficit occasioned by re sale—Interest—Allowable only from date of order 134

———O. 21, R. 89—Application under—Deposit by pleader's clerk—Legality of 119

———O. 22, R. 1—Guardianship—Death of appellant pending appeal against order appointing a guardian—Right of legal representative to continue the appeal—Appointment of guardian by reference to arbitration—Legality of 179

———O. 22, Rr. 3 and 10— Application under R. 3—May be treated as one under R. 10—Suit on behalf of Mutt—Plaintiff declared illegally appointed head—Death of —Applicant legal head of the Mutt—May be joined as legal Representative 341

———O. 22, R. 3 and O. 34 R 2—Mortgage suit—Death of plaintiff after preliminary decree abatement—Application for final decree—Limitation 181

———O. 32, R. 3 (5)—Minor defendants—Guardian *ad litem*—Appointment of head clerk of the Court—Omission of notice to person having custody of minors—Irregularity—Effect on decree 363

———O. 32, R. 4 (3)—Guardian *ad litem* appointment of—Consent proposed guardian—May be implied 291

———O. 32, R. 4 (4)—Appointment of a Court guardian—Father unwilling to act — Existence of other guardians, not known to the plaintiff—Decree, whether bad for non-representation of the minor—Mortgagor — Item of property within registration district, not belonging to the mortgagor—Whether martgage not properly registered —Fraud on the registration law 12

———O. 34, R 5—T. P. Act, S, 89 (repealed)—Omission of words " And thereupon extinguished"—Effect of. 391 *at* 394-5

———O. 37, R. 3—Leave to defend—Grant of—Discretion of Court—Principles—Payment into Court or furnishing security—Condition as to—Order imposing—When proper 255

———O. 40—Manager appointed under—Position and rights—Receiver—Removal of person from position of—Order refusing—Appeal from —Civil Procedure Code, O. 40, Rr. 1, 4 ; O. 43, R, 1 (s). ... 196

Costs PAGE.

———O. 40, R. 1—Appointment of Receiver—Rights to—Suit for partition—Malabar tarwad ... 133

———O. 40, R. 1—Appointment of Receiver — Grounds for—" No harm" not enough —Right to—Suit for partition—Malabar Tarwad—Properties in British India—Cochin Partition Regulation—Effect 133

———O 40, R. 1—Receiver — Appointment by trial Court pending appeal—Scheme settled by trial judge confirmed by appellate court—with slight variations — Whether Receiver *ipso facto* discharged 343

———O. 43, R. 1 (k)—Abatement—What is —Legal Representative brought on record —Another applicant's petition to bring himself on record dismissed as out of time—Whether an appeal lies ... 129

———O, 43, R. 1 (s)—Order refusing to remove Receiver—Appealability 196

———O. 47, R. 7—Grounds specified in—If the only grounds of attack available even in appeal from decree passed on review ... 463

Commission— Party— Examination on commission—Application for—Order disallowing Revision against — Interference in—Application by plaintiff — Application by defendant—Difference between 131

Companies—Dividends—Not held in trust by —for share holders ... 563

Consent order—Agreed to by counsel under mistake of fact—When can be set aside —serious and substantial injustice to be shown ... 160

Contract for sale of goods—Numbers on packages not material or of the essence of the contract unless descriptive of the quality of the contents —Mistake—Indian Contract Act (IX of 1872), Ss. 109 to 118 ... 625

Contract Act (as amended), S. 16—Construction Legislation of other countries—English Money-lenders Act and cases decided thereunder—Reference to—Permissibility—S.16, Sub S. (3)—Undue influence—Rectification of contract on ground of onus of proof —Unconscionable bargain—No proof of position to dominate will—Effect—Mortgage—Execution under undue influence—Presumption of—Security ample— Excessive and usurious interest—Provision for—Effect—Suit upon mortgage—Interest at contract rate—Till what date allowed 610

Copyright—Compilation consisting of reprint of passages selected from work of author—Notes attached to compilation—Copyright in compilation and in notes—Conditions—Abridgment of author's work—Meaning—Test - Copyright Act of 1911, S. 1, Sub-S. (1)—Original literature—Meaning—Test—United States—Decisions of—Not binding on Judicial Committee ... 637

Costs—Exaggerated claim—Court-fee paid on such figure—Decree given for small amount —Plaintiff entitled only to court-fee on amount decree ... 366

Costs. PAGE

——Respondent unnecessarily added--No relief granted against him—If entitled to ... 134

Court Fees Act, S. 7, Cls (1) (4) (e) and 11 (f)—Suit for declaration of plaintiff's liability to make a smaller periodical payment than that claimed by defendant--Valuation for purposes of Court Fees and jurisdiction 377

——S 7 (V) (a) and (d)—Suit for possession of specific plot of land in a permanently settled estate—Valuation for purposes of Court-fees—Market value—plaint not properly stamped — Undervaluation—Return of plaint Court having jurisdiction—Proper procedure—Civil Procedure Code, O. 7, Rr. 10 and 11 ... 345

——S. 7 (1) (V) (c) and Sch. II, Art. 17 (III and VI)—Suit for commutation of grain rent into money rent—Appeal Valuation—Court fee payable—Revision—Interference by High Court—C. P. Code, S. 115 460

——S. 8, Sch. I Art. 1 and Sch. II, Art. 17 (A) (ii)--Applicability of--Appeal by Government against award of compensation in a land acquisition case—Award by Chief Judge of Small Cause Court—Court Fee payable on appeal 150

Criminal Procedure Code, Ss 54 and 55 (c)—Penal Code, S. 225, B—Arrest by police constable without warrant — Resistance — Offence ... 447

——S. 145—Dropping proceedings under the section—Magistrate being satisfied that no dispute likely to cause breach of the peace existed—Source of Magistrate's information immaterial—Magistrate not bound to record evidence—Sale proceeds of crops on attached lands—Whether may be ordered to be kept in deposit in Court pending an order of one party or other ... 565

——S. 195 (6) — Jurisdiction under—Nature of, appellate, revisional, or special—Sanction to prosecute—Order revoking—Application to High Court under S. 195 (6) to set aside—Maintainability after new Code (Act XVIII of 1923) 274

——Ss. 369 and 439 (2)—Criminal case—Power of High Court to review its own decision—Criminal revision—Order enhancing sentence without notice to accused—Legality of—Re hearing of the case 456

——S. 488—Order for maintenance—Offspring of a Sammandham Right to maintenance against the father 324

——S. 540—Power of Court to summon Court witness—Existence of wide powers under the section — Discretion of the Court 325

Custom — Family custom in India—Tests governing local customs in England—Should not be applied 661 *at* 663—4

Execution. PAGE.

Damages—Breach of promise of marriage measure of damages—Exaggerated claim—Costs 366

——Divorce—Wife's adultery—Liability of co-respondent—Measure of damages—Practice ... 282

Decree—Conditional decree—Decree for possession on conditin of payment of money by plaintiff in 6 months—Provision in default dismissal of suit—Payment into Court time by mortgagee of plaintiff's property in suit—Whether good satisfaction of condition—Wrong order allowing mortgagee to withdraw—Extension of time so as to permit plaintiff's subsequent alignee to deposit—If correctly allowed ... 567

——Declaratory and granting injunction—Stay of Execution—It permissible. 138

——Execution of—Against legal representative of deceased Judgment—debtor—Decree against proprietor of impartible estate -Execution against succeeding zemindar—If profits accrued due since death of Judgment debtor liable in the hands of next zemindar—C. P. Code, S. 52—Madras Act II of 1904, S. 4 ... 261

A case of decree before the Act *also* 374

——For possession and preliminary decree for mesne profits—Execution application for ascertainment of mesne profits—Dismissal not on merits—If preliminary decree vacated—Subsequent application in the suit for ascertainment—It maintainable 46

——Setting aside — ground of fraud—Mere petition not enough 383 *at* 390

Deed—Construction—Sale Certificate—Conflict between boundaries and area—Rights of purchaser ... 182

——Construction—Doubtful meaning—May be explained by conduct 618 *at* 623

——Construction—Gift or Will—Test—No present disposition of any interest to the donee ... 288

Divorce—Damages against co-respondent—Measure of—Practice 282

Equities—Land purchased for minor by guardian with borrowed money— Creditor's rights—Decree against the land proper ... 49

Execution of decree--Attachment in—Property attached subject of contract for sale prior to attachment—Decree in suit for specific performance of contract for sale brought after attachment, and delivery of possession to contractee—Attaching creditor not made party to suit—Rights of attaching creditor and of vendee—Attachment if prevails against vendee's title—Remedy of attaching creditor in such a case ... 361

Execution—Stay of—Decree granting declaration and injunction—Permissible. 138

Execution. PAGE.

———Proceedings—Executing Court—Territorial Jurisdiction—Objection—If can be taken for the first time in appeal 250

Execution Sale—Parties to contract of—Court conducting sale—Position—Civil Procedure Code, O 21, R. 84—Deposit of 25 per cent. required by—failure to make—Re sale on account of—Deficit at—Bidder's liability for—Bidder acting as agent, but not communicating fact to Court or Nazir—His liability in case of Contract Act, S. 230, cls. (1) and (2)—Applicability—Mode of enforcing bidder's liability for deficit—O. 21, R. 71—Effect—Interest on deficit amount—Liability for Appeal—Dismissal—Respondent unnecessary—Costs of—Order as to 134

Fraud on registration—What is, sufficient to invalidate 12

Hindu Law—Adoption—Successive adoptions—If second adopted son brother of first adopted son—Point to be considered 598 *at* 610

———Adoption—Death of adopted son leaving a widow—adopting mother making a second adoption during widow's lifetime—Adopted son in possession of property to knowledge of plaintiff—Suit by reversioner of first adopted son to recover property—Challenging second adoption brought after six years—Limitation Act (IX of 1908). Arts. 118 and 141—Limitation Act, 1877. Arts. 118, 119 and 141 to Sch. 2—Limitation Act, 1871, Arts. 129 and 142 ... 598

———Adoption—Inheritance—Leprosy as a disqualification ... 537

———Adoption—Validity of—Family custom—Kashmiri Brahmins—Punjab Laws Act, IV of 1872—Concurrent finding of trial Judge and Appeal Court in India 661

———Debts—Partition—Liability of sons and their shares after partition for the pre-partition debts of their father—Relinquishment of the share by father and a provision for his maintenance—Whether father continues joint afterwards 590

———Family house—Right of residence of members of Hindu Family—Not a right *in rem.* 145 *at* 149

———Joint family—Father—Debts of, not immoral or illegal—Son's share in family property—Liability of. during father's life-time 86

———Joint family—Father—Debts of—Son's pious obligation in respect of—Enforceability during father's lifetime—Mortgage of ancestral and joint property by father—Validaty against son—Conditions—Antecedent debt—Meaning mortgage to discharge prior mortgages not shown to be for necessity or for discharge of antecedent debt—Validity against son—Stare decisis—Principle of—Applicability—Plea not taken in number of cases argued by eminent counsel—Inference from 23

Hindu Law. PAGE.

———Joint Family—Father—Decree for possession against—Executability of, against his sons after his death—Sons not parties to suit—C. P. C.—S. 53—Decree in, if confined to money decrees—Father—Suit against—Capacity in, representative or individual—set—Title—Possession—Evidence—Union receipts 471

———Joint family—Manager—Account of family property on partition—Duty in regard to—Nature and extent of—Misappropriation by manager—Meaning of—Family house—Residence of members of family in—Nature of—Partition—Provision for residence in case of—Allotment of portion of family house—Necessity—Allotment of portion in other house—Allotment of money—If and when may be made 145

———Joint family—Manager—Contract for sale by—For binding purposes—Specific enforcement against survivors after manager's death—Some of survivors minors—Whether that makes any difference ... 57?

———A limited owner—Alienation by—Not for justifiable purposes—Improper compromise—Reversioners—May treat as nullity without intervention of Court 172

———Limited owner—Alienation by way of compromise—Transferee for value from alienee—Reversioner's suit—'Necessity'—Burden of proof 172

———Minor—Guardian—Debt borrowed for purchase of property for minor—Binding character of, against minor's estate or heirs—Purchase beneficial to minor—Effect—Creditor's rights in such case 49

———Limited (woman's) estate—Compromise by daughter—Improperty induced—Not binding on the reversioners—Compromise same footing as alienation 172

———Partition—Sisters—Survivorship—Right to, when lost 285

———Partition—Relinquishment by father of his share in liew of his maintenance—Whether father continues joint afterwards. 590

———Partition-Suit by to minor plaintiffs—Decree—No Severance of interest between plaintiffs *inter se* 401

———Widow—Adoption by—*Factum* or validity of—Her right to dispute—Estoppel—Adoption in assertion of authority given by husband to adopt—Treatment and holding out of boy as adopted son by her—Validity disputed long after adoption on ground of absence of authority—Effect 52

———Widow—Maintenance—Enhanced maintenance in future—Release of right of—Validity—Residence—Rights of—If seperate from that of maintenance 189

———Widow—Will—Legatee—Rights of—If can sue trespasser—Vacant site—Presumption as to possession 560

Inam—Service Inam—Enfranchisement and issue of a title deed—Creation of a new title in favour of grantee—Exclusive possession against grantee prior to enfrachisement—Effect of—Adverse possession 482

Inam Register—Inam statement—Evidentiary values of 246

Income Tax Act of 1918, S. 2, Cls. 6 and 7—Machinery sold as not absolete—Loss sustained by sale-Deduction from annual profits—Assessee's right to—Statute-Punctuation marks if and when part of 42

———(II of 1922), Ss. 6, 10 and 24 -Assessee—Set-off— Right of—Trade in individual capacity--Trade as member of unregistered firm—Loss incurred in latter—Set-off against profits made in former—Right of—S. 10 "any"—Meaning—S. 244 (1) and (2)—Applicability and effect 68

Jurisdiction—Objection to—May be taken at any stage—Appellate Court bound to take notice if defect manifest on record. 628 *at* 636

Land Acquisition Act, 1894—Mortgaged property—Acquisition of—Mortgagee's rights and remedies in case of—Payment of compensation money to mortgagor—Mortgagee's remedy in case of—Suit to recover money from Crown—Maintainability—Cause of action—Costs awarded to mortgagee in suit on mortgage—Crown's liability of 36

————S. 18—Reference to Court—Order refusing— Propriety — Revision against order—Right of—Civil Procedure Code. S. 115, Government of India Act, S. 107—Effect—Arbitrary refusal to refer—Remedy in case of—Necessity—Amendment of S. 18—Court—Court subordinate to High Court—Acting judicially—Meaning. 209

Landlord and tenant—Renewal of lease—Invalid renewal—Rights of parties—Notice to quit given by one of two Uralans—Validity of- Institutions of suit by one Uralan without consulting co-Uralan 122

Land Tenures—In Madras—Ekabhogam—Arudagirie—Samudayam or Pasunkarie—Incidents of—Distinctions between. 547 *at* 553

Legal Practitioner—Purchase benami in name of his wife of decree in suit in which he acted for judgment debtor—Purchase of property in execution of that decree in name of his wife—Leave to bid obtained by wife without disclosing fact that she held benami for her husband—Validity of purchases—Husband not pleader at time of execution sale—No advantage gained by him at that time by reason of his former position as pleader for judgment debtors—Effect—Trusts Act, S. 88 532

Legal representative—Assets of deceased in hands of—Impartible estate—Decree for money against predecessor — Execution against money payable under a lease granted by predecessor but for period subsequent to his death—Money if assets in hands of successor—Succession to estate by survivorship—Madras Impartible Estates Act, S 4—Debt borrowed by holder for benefit of estate—Recovery from successor procedure—Execution of decree or seperate suit—Execution Petition—Conversion into suit—Conditions 374

————Religious institutiod—Mutt—Suit by wrongly appointed head on behalf—Death of plaintiff *pendente lite*—Right of lawfully appointed successor to continue suit—O. 22 Rr. 3 and 10—Applicability—Application under wrong rule — Order granting. under rule applicable—Propriety ... 341

————Plaintiff deceased—Petitions by several persons to be brought on record as legal representative—Grant of one, and rejection of others—Appeals from orders of rejection of latter —Maintainability— C.P. C.—O. 43, R 1 (k) , S. 2 (2)—Effect—Will set up by person whose petition is rejected—Genuineness of—Opinion on—Not to be expressed ... 129

Letters Patent, Cl. 15—Judgment—Meaning—Execution of decree—Stay of—Order of Single Judge refusing—Appeal against 138

————(Madras), Cl, 15. —" Judgment"—Appealability—Order of single Judge refusing to alter the terms of sale proclamation and to adjourn sale 71

————Cls. 39 and 44 and C. P. Code, S. 111—Appeal to His Majesty in Council from final orders of the High Court—Order on a Civil Revision Petition--final since amendment of Letters Patent—Control by Imperial Legislation—Leave to appeal to Privy Council—Can't he granted 117

Limitation Act—Whether applies to application under S. 8, Presidency Towns Insolvency Act, *quaere* 580 *at* 586

———1871, 1877, and 1908—Effect of changes in the law on suits 578

————S. 3—Institution of suit--Presentation of plaint on last day to a Judge outside court after office hours—Acceptance by him—If suit barred 78

———— S. 19—Acknowledgment of liability—Suit on a mortgage—Admission of the execution of the mortgage—Non-denial in the written statement by the legal representative of the motagagor of the subsistence of the debt, whether amounts to an acknowledgment of liability—Civil Proceedure Code, O. 8 R. 5. ... 1

————S. 19—Acknowledgment—Suit for a definite sum claimed as balance of account—Admission by defendant that account must be taken and settled—Valid acknowledgment to save limitation. ... 468

———Art. 44, 91 and 144—Suit by minor—Junior member of Traward for possession—Immoveable property alienated by Karnavathi—latter acting for herself and for minor junior members—Article of limitation applicable. 340

———Arts. 118 and 141—Suit by reversioner for possession—Involving a challenge of an adoption—Limitation period. 598

———Art. 116—Company—Suit for dividends—Auction purchaser of shares—Refusal by Company to register the purchase—Position of purchaser—Company if trustee—Limitation ... 563

———First Schedule, Art. 141—Suit brought within 12 years of death of Hindu widow of ancestor for recovery of possession—Mode of proof of certificate of death—Observations on register of purohit—Finding of fact by trial judge reversed by court of Appeal. ... 541

———Arts. 166 and 181—Void execution sale—Application to set aside—C P. Code, S. 47—Limitation period, ... 104

———Art 183—Execution of decree—Limitation—Payment by Court—Effect of—Saving of limitation. 453

Madras Act (VIII of 1869)—Effect- Only retrospective and not prospective 482

———(II of 1904) (Impartible Estates) S, 4.—Debt of deceased Zemindar—Decree against Zemindar—Liability of estate in hands of successor—Execution proceedings—If can be decided in. 374

———(II of 1920). S 78—Rules under—Rule 56—accused may. decline to plead—No offence under S. 179, I P. C., committed thereby. 40

Madras Act (III of 1889), S. 6—Keeping a common gaming house, meaning of 309

Madras Act V of 1920—Election—Validity—Ballot paper—Initials of polling officer placed on face of—Effect—Serial number printed on face of ballot paper —Election Rules 14 (1), 17 (1)—Rule requiring marking of serial number on back of ballot paper—Validity. 491

———R. 17 (1), S. 9 (1)—Ballot papers given to voters with serial numbers and voters own number on electoral roll inserted on back—Validity of election—Effect on—Election declared void—Effect—New election—Retiring councillor if deemed to have been re-elected. ... 494

Madras City Municipal Act (IV of 1919) S. 110 and Sch. IV. R. 7—Proviso—"Gross income received in or from the city" of Madras—Meaning of. 505

———S. 110—R. 7. Sch IV of the taxation rules under the Act—Incorporated companies transacting business in the City of Madras with paid up capital in currency other than the currency of British India—Liability of such companies to be taxed under S. 110 and the taxation rules—Principles of construction of taxation statutes.... 217

Madras City Tenants Protection Act (III of 1922), S. 9—Applicability—Ejectment decree—Application for purchasing landlord's interest—Pendency of appeal when Act came into force—Rights of parties—Appeal if a continuation of suit—Temple lands—Building leases for 21 years—Option to renew for similar period—Validity of. ... 407

Madras Estates Land Act, S. 3 (2) (d)—Estate—Religious Endowment—Temple—Property granted to, if and when an estate——Grant—Construction—Grant of melwaram only or of kudiwaram also—ejectment suit by temple against tenant of endowed lands—Permanent rights of occupancy—Tenants's claim to proof—Onus—Quantum presumption of grant of permanent right of occupancy by Shebait in endowed property— Permissibility— Grant of permanent right of occupancy by trustee of temple in endowed lands—Validity—Binding nature of, on his successors—Endowed property of temple—Permanent right of occupancy in—Presumption—Grounds of—Description of tenant as Kudimiras—Alienation by tenants to knowledge of temple officials—If sufficient to raise—presumption—Temple — Judicial person—Trustee of temple—Alienation of endowed property—Validity— Conditions— Permanent tenancy—Creation — Power of Improper alienation by trustee—Suit by him to set aside—Maintainability—Estoppel—Permanent right of occupancy—Origin, nature and incidents of—Claim to such right in ejectment suit by Landlord against tenant—Onus of proof—Acquisition of permanent right of occupancy by tenant against landlord—Impossibility of — Words — Kudi, Mira°, Kudimiras, Kudiwaram or Kudiwaram interest—Ekabhogam—Arudikaries—Samudayam--Pazhangaries—Meaning of. 546

——— Ss. 5 and 125—Sale of ryot's holding for arrears of rent—Effect on prior encumbrance—Mortgage created after the Act in renewal of a prior mortgage before the Act—Decree on mortgage—Rights of purchaser at execution sale. 380

———S. 181—Requisition by petitioner to Court as to balance of amount payable by him—Payment of a smaller amount under information by the office—Payment of balance after the expiry of the time limited under a notice of Court—Delay caused by an act of Court—Delay excused, ... 329

Madras High Court--Appellate Side Rules, App. XII, Rule 41—Applicability to Insolvency Appeals 580 *at* 588

Madras Local Boards Act (XIV of 1920), S. 57—Rules framed by the Local Government—Rules 1,4 (3) and 12 (2)--Election of President of a Taluk Board--Objection to election—Scope of the enquiry—Decision of

District Judge--*Persona Designata*--Court--Finality of decision—Revision—Interference by High Court—C. P. Code, S. 115 ... 201

————, (1884) Ss. 16. and 144—Rules 33 (c) and 35 of rules framed under S. 144—Validity—Order setting aside election on ground specified in R. 33 (e)—Validity—Inquiry opportunity to show cause against order—Necessity—Rule authorised by Act but purporting to be framed under wrong section—Validity. ... 61

Malabar Law—Karnavan—Alienation of tarward property—Suit by other members to recover property alienated—Limitation Act, Arts. 44, 91, 144—Applicability—Karnavan executing deed of alienation not only as Karnavan but also as guardian of minor members—Effect. 340

Malicious Prosecution—Damages—Malice—Proof of—Indirect motive—Advantages in civil dispute—Advise of counsel—Effect of —Quantum of damages—Interference on appeal. 353

Maxim—Allegans suam turpitudinem non est audiendus—Applicability. 298

Minor—Decree against—Declared not binding—Effect of declaration—If prior suit may be reopened against the minor- Inherent power of Court. 348

————Sale in favour of—Not involving a promise by minor—Contract between vendor and minor's father—Transfer valid. ... 464

————Suit against — Guardian *ad litem*—Not bound to defend if defence useless. 290 *at* 294

————Suit against—guardian *ad litem*—Appointment of—Irregularity in—whether amounts to non representation—If decree liable to be set aside—Proof of prejudice necessary. ... 363

————Whether knowledge can be imputed to—Where knowledge of a fact is the starting point of Limitation 598 *at* 605

Money paid into Court—Right to draw out —Mortgage—Civil Procedure Code, 1908, S. 47. 567

Mortgage—Decree for sale on—Sale of mortgaged property in execution and purchase thereof by stranger—Sale of portion of property in execution of money decree against mortgagor subsequent to mortgage but prior to sale in execution of decree thereon —Purchaser at not made party to mortgage suit—Effect on rights of parties—Fresh suit for sale by purchaser in execution of mortgage-decree against purchaser in execution of money decree—Maintainability—Redemption by latter—Terms of—Order absolute for sale - Effect on mortgage security—Transfer of Property Act, Ss.88, 89 —Civil Procedure Code of 1908—O. 34, R. 5—Distinction. ... 391

————Marshalling securities—Prayer when to be made—In execution, not in suit—Immaterial that prayer in suit was refused. ... 32

————Prior and puisne mortgagee—Decree on mortgage—Subsequent suit for maintenance and declaration of charge—Decree subject to rights of prior mortgagee —Sale in execution of mortgage decree—Rights of purchaser—*Lis pendens* ... 258

————Lands with crops raised from time to time—Subsequent mortgage of lands alone—Auction purchaser subject to mortgages--Payment to prior mortgagee by auction purchaser—Realisation of part by sale of crops—Sale of lands in the subsequent mortgagee's suit Proceeds-Subrogation—Priority—Transfer of Property Act (IV of 1882), S. 101. 164

Mortgage decree—Execution—Sale of properties in particular order—Application for — Maintainability — Application to that effect refused in suit itself—Effect—Purchase of some items by *A* without notice—Usufructuary mortgage of other items to *B* with notice—Order of sale in case of 32

Mortgage deed—Attestation—Validity—Question as to—Appeal--Maintainability for first time in—Usufructuary mortgage — Personal covenant to pay—What amounts to ... 56

Occupancy right—In a service inam—Onus—Presumption 515

————Incidents—Lands not in an estate—Tenant—Whether can acquire by prescription—Only by grant—Statute or custom 547

Partnership—Dissolution of old partnership and formation of new one—Accounts of old Partnership—Right to take, on dissolution of new one—Condition—Limitation 503

Partnership at will—Dissolution — Legal right—Gross misconduct—Falsification of accounts 158

Partnership accounts—Suit by widow of partner—Compromise—Advocate's consent —Order—Liability to be set aside—High Court—Statement of facts and conclusion —Presumption 160

Pauper—Application for leave to sue as—Nature of—Dismissal of petition—Validation of plaint by payment of Court-free within time allowed—Effect—Date of presentation of plaint in such a case 254

Penal Code, Ss. 34, 149 and 395—Dacoity—Unlawful assembly—Rioting—Common intention—Basis of a conviction for dacoity —Necessity for charge and proof that the lawful assembly had common intention of committing dacoity or that each accused knew that dacoity was likely to be committed in pursuance of the common object 311

————Ss. 147 and 323—Offences under—Conviction by trial magistrate—Conviction altered on appeal into one under S. 160, I. P. C.—Propriety of ... 120

Penal Code, S. 179. PAGE.

———S. 179—Conviction under—Legality—Panchayat Court—Accused charged before—Declining to plead or to answer question put to him—Conviction for—Procedure before Panchayat courts—Madras Act II of 1920, S. 78 -Rule 36 of rules framed under ... 40

———S. 225-B—Lawful custody—Arrest by a police officer purporting to act under one authority—Whether it is open to prosecution to say that the arrest was under some other power ... 447

———S. 353—Offence under—Revenue Inspector—Distraint for arrears of revenue by—Resistance to—Offence committed by—Warrant of distraint addressed only to village headman, his subordinate—Effect ... 45

Possession—Vacant site—Physical possession impossible—Possession follows title ... 560

Practice—Appeal—Question as to valid attestation of mortgage—One of mixed fact and law—If may be raised for the first time in appeal 56

———Appellate Court—Objection to jurisdiction—May be taken at any stage—If defect manifest on facts—admitted or proved, appellate court bound to take notice 628 (P.C.) *at* 636

———Privy Council—Adoption—Issue of fact of trial Judge reversed by appellate Court and Privy Council—Practice of Privy Council in deciding questions of fact 625

———Privy Council—American decisions not binding on ... 648

The Presidency Towns Insolvency Act, Ss. 8 and 22—Insolvency Appeal—Order of adjudication annulled—Pendency of proceedings in another Court—Power of Court to review order—"The same debtor"—Meaning of—Two persons adjudicated in one Court and one of them in another—If Court can annul order under S, 22 ... 580

Presumption—Transaction presumed offending legal principles—Presumption that the trestee of a religious endowment granted a permanent lease—Breach of his duty—Cannot be presumed 547 (P. C.) *at* 557, 559

Probate and Administration Act, S. 3—Deed—Construction—Gift or will—No disposal of any immediate interest in property 288

———Revocation of probate—"Just cause"—If absence of citation to a person otherwise aware of the proceedings is—If such person may be permitted to put forward a cause that he did not press in the original proceeding ... 383

Provincial Insolvency Act of 1907, S. 18 (1)—Receiver—Order appointing and vesting property in him — What amounts to—Official Receiver acting as agent of Court—Sale of property by—Validity—Ratification by Court—Effect—Hindu Law—Joint family—Father and minor son—Adjudication of—Validity as regards minor son—Sale of

Registration Law. PAGE.

family property by Official Receiver—Interest of minor son if and when passess under—Receiver professing to act as assignee of father and of minor son, but purporting to convey entire property—Effect—Deed—Construction ... 31

———Ss, 4 and 80—Insolvency—Sale of properties by official Receiver—Objection by claimant—Procedure—Power of Official Receiver to inquire 80

———S. 56 (S.18 of Act III of 1907)—Vesting order on the Receiver—What amounts to—When to be made 184 *also* 314

———Ss. 58, 59 (c) and (e), 68 and 80—Transfer of Insolvency petition to official Receiver for disposal no vesting order—Sale of properties by Official Receiver—Setting aside—Limitation 184

———S. 68—Application by creditor to District Court under—Parties—Official Receiver—Non-joinder of—Effect—Evidence taken by Official Receiver—Use of, at bearing of application — Permissibility—Evidence additional—Admission of—Power of District Court ... 242

Punjab Laws Act (IV of 1872), S 5—Kashmiri Brahmins—Governed by custom—Adoption—Of a boy 17 years old whose Upanayanam had been performed—Validity ... 661

Punjab Pre-emption Act II of 1905, S. 3 Sub-S. 1—Agricultural land—Tea garden of extent of fifteen or sixteen hundred acres if a—Punjab Alienation of Land Act XIII of 1900 S. 2, Sub-S. 3 ... 536

Railway—Goods entrusted to, for transport—Loss in transit—Damages for—Suit for—Limitation—Starting point—Limitation Act—Art. 31—Applicability—Onus of proof in such suit—Entrustment under owner's risk note—Effect—Theft from running train—Meaning—Railway Act of 1890—Ss. 77, 140—Subordinate officer like District Traffic Superintendent—Notice to—Validity—Conditions ... 302

Railways Act, 1870, Ss. 77 and 140—Loss of goods consigned—Claim for compensation—To whom must be preferred—'Railway administration' —Meaning of ... 302

Receiver—Discharge of—Scheme suit—Decree in—Receiver appointed in pursuance of—Appeal against decree—Affirmance of decree with slight modifications—Effect of appellate decree on receivership—No *ipso facto* discharging of receiver ... 343

Registration law—Fraud on—Item not belonging to mortgagor included in mortgage deed—No other item within the registration district—Mortgagee not participating in intention to include such item—No collusion between mortgagor and mortgagee—If registration invalid. 12

Religious Endowments. PAGE.

Religious Endowment—Lands of—Tenants—If tenancy can be presumed permanent—Presumption that transaction by trustee was in breach of his duty—If can be made 547 (P.C.) *at* 557

———Public Endowment—Evidence of—Inam Statement—Inam register—Relative values of—Devadayam — Description of Inam as—Effect of—Civil Procedure Code, S 92—Scheme-suit for, and for removal of trustees—Decree in plaintiff's favour owing to default of prosecution of defence—Setting aside of—Jurisdiction—Scheme—Framing of—Decree for, when granted ... 245

Resjudicata—Will — Probate Proceeding—Order after contest in—Binding character of—Grant of probate—Effect—Revocation for "just cause" under S. 50 of Probate and Administration Act—Party having opportunity of putting forward particular just cause but omitting to do so—Right to apply for revocation of—Effect on—Absence of special citation to him—Effect—Application by another party for revocation — Party already defeated if can avail himself of—Decree obtained by fraud—Setting aside by mere petition—Permissibility 383

——— Between co-defendants--Rule as to—Applicability of—Conditions—Fraudulent benami transfer—Plea of—Maintainability—Covenant for quiet enjoyment—Damages for breach of—Suit for—Plea in ... 298

Review—Criminal matter—Power of High Court—Cr. Pr. Code, S. 369 456

———Order granting— Appeal against—Grounds of—C. P. C.—O. 47, R. 7—Grounds specified in—Final decree—Appeal from—Scope of—Appellant if can argue appeal on its merits 463

Sale-deed—Construction—Discharge of debts binding upon property sold—If and when condition precedent to passing of property—Minor—Sale in favour of— Validity—Tests—Transfer of Property Act—S. 55 (5) (*d*)—Buyer's duty under--Basis of—Implied contract if ... 464

Service Inam—Claim of permanent occupancy by tenant—Burden of proof—Permanent lease of service inam lands—Validity of—C. P. Code, S. 11—Suit in ejectment—Claim of permanent occupancy right negatived—Dismissal of suit on the ground of want of notice to quit—Fresh suit—Defence of occupany right—Bar of *res judicata* 515

Specific performance—Contract by manager of a joint Hindu family to sell property—Specific performance of contract against minor members after death of manager 575

Stare decisis — Hindu Law —Mortgage by father of joint family—Antecedent debt—What is—Pious obligation in father's lifetime—Point not taken by eminent counsel in a series of cases, where if taken and upheld result would have been the other way—Conclusion that plea bad irresistable 23 (P.C.) *also* 86 (F.B.)

Transfer of Property Act, S. 83. PAGE.

Statute construction—Punctuated statute—Punctuations part of statute—Inference from absence of a comma ... 42

[Note—In the catchwords of 46 M.L.J. 42, the section is wrongly given—Put "S. 9 (2), Cls. 6 and 7."]

———Construction—Indian (Contract) Act—English Statutes—Expressions in—Decisions on—Not to be invoked 610 (P.C.)

———New rights created and remedies prescribed by the same statute—The remedies conferred exclusive of ordinary remedies—Land Acquisition Act, 1894. Ss. 18 and 31 36

———Taxing statute—Construction—Principles of 217

Subrogation—A mortgagee taking a later mortgage of same property for part of first mortgage—Money—No question of Subrogation where strangers to first mortgage do not pay it off ... 380

Suits valuation—Declaratory suit—No consequential relief—Valuation for purposes of jurisdiction—Whether can be higher than subject matter in dispute ... 377

Title—House-property—Evidence— Payment of union taxes—Union receipts ... 471

Transfer of Property Act, S. 53—Fraudulent transfer—Avoidance of—Mortgage in part supported by consideration—Transaction intended to defeat creditors—Mortgage not wholly void—Debts discharged by transfer intended to defeat creditors—Proof of—Onus on transferee 125

———S. 53—Fraudulent transfer—Avoidance of—Mortgage intended to prefer some creditors and defeat other—Not wholly void—Debts discharged by transfer intended to defeat creditors—Proof of—Onus on transferee. ... 125

———S. 55 (5) (d)—Obligations on the vendee—Statutory and not contractual 464 *at* 468

———S. 59—Equitable mortgage—Document creating or document merely recording already completed transaction of—Test — Registration — Necessity —Document creating equitable mortgage unregistered—Proof of mortgage by proof of fact of deposit of title-deeds—Permissibility ... 295

———S. 81—Marshalling—Sale of some items without notice to vendee of a prior mortgage—Mortgage of other items comprised in the prior mortgage with notice thereof—Vendee entitled to have the latter items sold first in pursuance of the prior mortgage--Quaere, if S. 81, T.P. Act, applies 32

———S. 83—Deposit of mortgage money—Money paid to the account of legal representatives of mortgagee and sub-mortgagee—Validity of deposit ... 74

Transfer of Property Act, S. 83. PAGE.

———S. 83—Deposit under —Validity—Effect—Death of mortgagee—Dispute as to who is legal representative—Deposit in case of ... 497

———S. 101—Subrogation—Court purchaser of mortgagor's rights paying off 2nd mortgage—Sale of property at the instance of 3rd mortgagee—Balance of proceeds after discharging 1st mortgage—Whether purchaser entitled to balance, as subrogated to the rights of the 2nd mortgagee 164 (P.C.)

Trust—Co-trustees—Suit by one trustee without consulting the other—latter made a party—Defendant—If suit maintainable ... 122

Trustee—*De facto* trustee—Right to sue on behalf of Mutt ... 341

Trusts Act, S. 88—Principles underlying—Applicability—Where Act is not in force... 532

Witness—Credibility of—Weight of evidence—Distinction—Attitude and trustworthiness of witness—Demeanour in the box—

Words and Phrases. PAGE.

Trial judge—Opinion—Appellate Court—Different conclusion—Only if exceptional circumstances 334 (P.C.)

Words and Phrases —Agricultural Land—Whether tea-gardens included 536 (P.C.

——— Alienation—whether permanent lease is ... 515

———Arudigarie—Meaning. 547 (P.C.), 553

———Ekabhogam—Meaning of 547 (P.C.) *at* 553

———"Gross income"—Meaning of ... 505

———Kudimiras—Meaning of 547 (P.C), 559

———Kudivaram—Meaning of 447 *at* 550

———Pasunkarie or Samudayam—meaning 547 (P.C.) *at* 553

———Rokka-guthagai—Meaning of 547 *at* 552

———Samudayam or Pasunkarie—Meaning of 547 (P.C.), 553